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Supreme Court of the United States

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC
FINANCE AND EX-OFFICIO CITY TREASURER
OF THE CITY OF NEW ORLEANS, ET AL., APPEL-
LANTS,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

FILED AUGUST 25, 1948.

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FIFTH CIRCUIT

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**IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT**

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday in November, A. D. 1947, at New Orleans, Louisiana, before the Honorable Joseph C. Hutcheson, Jr., the Honorable Leon McCord, and the Honorable Elmo P. Lee, Circuit Judges:

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Etc., appellant, vs. Mississippi Valley Barge Line Company, Appellee,

George Montgomery, State Tax Collector, Etc., appellant, vs. Mississippi Valley Barge Line Company, appellee,

Lionel G. Ott, Commissioner of Public Finance, and Ex-Officio City Treasurer, Etc., appellant, vs. American Barge Line Company, appellee,

George Montgomery, State Tax Collector, Etc., appellant, vs. American Barge Line Company, appellee,

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Etc., appellant, vs. American Barge Line Company, appellee,

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Etc., appellant, vs. Mississippi Valley Barge Line Company, appellee,

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Etc., appellant, vs. Union Barge Line Corporation, appellee,

George Montgomery, State Tax Collector, Etc., appellant, vs. Mississippi Valley Barge Line Company, appellee,

George Montgomery, State Tax Collector, Etc., appellant, vs. American Barge Line Company, appellee.

Be it remembered, That heretofore, to-wit, on the 11th day of September, A. D. 1947, transcripts of the record in the above styled causes, pursuant to appeals from the District Court of the United States for the Eastern District of Louisiana, were filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcripts were filed and docketed in said

Circuit Court of Appeals as Nos. 12117, 12118, 12119, 12120, 12121, 12122, 12123, 12125, and 12126, as follows, to-wit:

[fols. 3-5] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 12117

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

Appeal from the District Court of the United States for the
Eastern District of Louisiana

[fols. 6-7] IN DISTRICT COURT OF THE UNITED STATES, EAST-
ERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

No. 845 (Civil Action)

MISSISSIPPI VALLEY BARGE LINE Co., Plaintiff-Appellee,

versus

JESS S. CAVE, City Treasurer, Defendant-Appellant

APPEARANCES:

Messrs. Fred^s S. LeBlanc, W. Charles Perrault, Bertrand
I. Cahn; Henry G. McCall, Alden W. Muller, Howard W.
Lenfant, Attorneys for Appellant.

Messrs. Lemle, Moreno & Lemle (Arthur A. Moreno, Edq.
& Selim B. Lemle, Edq.), Attorneys for Appellee.

Appeal from the District Court of the United States for the
Eastern District of Louisiana, to the United States Cir-
cuit Court of Appeals for the Fifth Circuit, returnable
within forty (40) days from the 13th day of January,
1947, at the City of New Orleans, Louisiana.

Extensions of time granted by the Honorable United
States District Court, Eastern District of Louisiana and
the Honorable United States Circuit Court of Appeals for
the Fifth Circuit, bringing the return day up to and in-
cluding the 10th day of September, 1947.

[fol. 8] IN UNITED STATES DISTRICT COURT

No. 845

[Title omitted]

COMPLAINT FOR RECOVERY OF TAXES PAID UNDER PROTEST—
Filed June 24, 1944

1

Plaintiff, Mississippi Valley Barge Line Company, is a corporation organized and existing under the laws of the State of Delaware and a citizen of that State, with its domicile in the City of Wilmington, Delaware. Defendant, Jess S. Cave, is the duly constituted and qualified Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, State of Louisiana, and is a citizen and resident of said State, being domiciled officially and actually in the City of New Orleans, Louisiana, within the New Orleans Division of this Honorable Court.

2

This suit is for a refund of taxes in the amount of \$11,373.21 paid under protest by plaintiff to defendant, with interest thereon. Jurisdiction is founded upon diversity of citizenship and the existence of a federal question as to the validity of said taxes, under the provisions of Section 24(1) of the Judicial Code of the United States (28 U. S. C. 41(1)).

3

The City of New Orleans is a duly incorporated municipality created and existing under the provisions of Act 159 of 1912 of the General Assembly of Louisiana, as amended.

4

Plaintiff is engaged, among other things, in the business of transporting merchandise and cargoes of various kinds [fol. 9] in interstate commerce between ports situated in Louisiana, Arkansas, Tennessee, Illinois, Kentucky, Ohio, and other states, and in connection with its said business, owns and operates certain towboats and barges, which it is using in this business of interstate transportation upon the navigable waters of the United States. These towboats

and barges have their taxing situs at the domicile of the plaintiff in Wilmington, Delaware, and have not acquired any situs in the State of Louisiana. The said towboats and barges are engaged continuously in the transportation of merchandise and cargoes of various sorts between the City of New Orleans and ports in other states and between points of origin and destination in other states, passing through the State of Louisiana en route, and are from time to time only temporarily in the State of Louisiana for the purpose of either loading or unloading cargo in said state or passing through the said state on interstate voyaged.

The Louisiana Taxing Commission is a body created for the purpose of fixing assessments on property having a situs in Louisiana and subject to the taxing power of that state.

The Louisiana Taxing Commission has assessed, as the property of plaintiff located in or having its situs, either legally or actually, in the State of Louisiana, the towboats and barges used by plaintiff in interstate commerce, as aforesaid, notwithstanding and against the protest of plaintiff that such marine equipment did not have any taxing situs in the state and was an instrumentality of interstate commerce and not subject to the taxing power of the State of Louisiana.

Based upon the illegal and unconstitutional assessment of said towboats and barges belonging to plaintiff by the [fol. 10] Louisiana Taxing Commission, the City of New Orleans has demanded and exacted of plaintiff payment of an ad valorem personal property tax for the year 1944, based upon such unlawful and unconstitutional assessment, and unless plaintiff had paid such tax, its property would have been seized and sold in satisfaction of the tax based upon such unlawful and unconstitutional assessment. Accordingly, under Act 330 of 1938, plaintiff, on the 29th day of May, 1944, paid to the said Jess S. Cave in his capacity as Commissioner of Public Finance and Ex-Officio City

5
Treasurer of the City of New Orleans, taxes in the sum of \$11,373.21, based upon said unlawful and unconstitutional assessment, and at the time of such payment protested in writing against the exaction of such tax as unlawful and unconstitutional, all as is more fully shown by a copy of said protest dated May 29, 1944, and a copy of a letter of John A. Barrett, Aide to the Commissioner of Public Finance, dated May 29, 1944, which are attached hereto and made part hereof.

8

The assessment for taxes of the aforesaid marine equipment belonging to plaintiff was and is void and unconstitutional as violative of Article I, Section 8 of the Constitution of the United States, as being a direct tax on interstate commerce, and is further violative of the 14th Amendment to the Constitution of the United States and Article I, Section 2 of the Bill of Rights of the Constitution of Louisiana, as taking the property of plaintiff without due process of law.

9

In the alternative only and in the event that the Court should find that said marine equipment, or any part thereof, has any taxing situs in the State of Louisiana, plaintiff avers that the method used by the Louisiana Taxing Commission in assessing the said marine equipment for ad valorem personal property taxes in Louisiana was incorrect and resulted in an excessive assessment and an excessive ad valorem property tax for the year 1944 by the City of New Orleans based thereon.

[fol. 11] The total ad valorem personal property tax levied by the City of New Orleans on the personal property of Mississippi Valley Barge Line Company for the year 1944 was the sum of \$12,839.60, all of which plaintiff paid to the City of New Orleans prior to the said tax having become delinquent, and plaintiff is entitled to recover the sum of \$11,373.21, which is that portion of the total of the tax aforesaid which is based upon the assessment of plaintiff's marine equipment, illegally assessed as aforesaid.

Wherefore, plaintiff demands judgement against defendant, Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, in the sum

6
of \$11,373.21, with 2% per-annum interest from May 29, 1944 until paid, and for all costs.

(Sig.) Arthur A. Moreno, Selim B. Lemle, 625 Hibernia Bank Building, New Orleans, Louisiana, Attorneys for Mississippi Valley Barge Line Company.

Of Counsel:

Lemle, Moreno & Lemle, 625 Hibernia Bank Building, New Orleans, Louisiana.

[fol. 12] IN UNITED STATES DISTRICT COURT

(Number and Title Omitted)

ANSWER—Filed July 13, 1944

Now into Court comes Jess S. Cave, Commissioner of Public Finance of the City of New Orleans and for answer to plaintiff's complaint respectfully sets forth:

I.

For lack of sufficient information to justify a belief defendant denies the allegations of Paragraph 1 of plaintiff's complaint except as to the defendant's office, citizenship and residence, which is admitted.

II.

Defendant admits that this is a suit for refund of taxes, but denies the jurisdiction for lack of sufficient information to justify belief and denies the remainder of allegations of Paragraph 2 of plaintiff's complaint.

III.

Defendant admits the allegations of Paragraph 3 of plaintiff's complaint.

IV.

For lack of sufficient information to justify a belief defendant denies the allegations of Paragraph 4 of plaintiff's complaint, except as may be hereafter admitted.

7
V
Defendant admits the allegations of Paragraph 5 of plaintiff's complaint and further sets forth that the Louisiana Taxing Commission has the right and power to fix assessments on the property owned by plaintiff, and which is the subject of the tax herein.

VI

Defendant admits that the Louisiana Taxing Commission has assessed the said property of plaintiff in this State, but [fol. 13] denies for lack of sufficient information to justify a belief the allegations of protest mentioned therein, and other allegations contained therein.

VII

Defendant admits the allegations of Paragraph 7 of plaintiff's complaint, except that the taxes in question are based upon an illegal, unlawful and unconstitutional assessment which is expressly denied.

VIII

Defendant denies the allegations of Paragraph 8 of plaintiff's complaint.

IX

Defendant denies the allegations of Paragraph 9 of plaintiff's complaint.

X

Defendant admits the allegations of Paragraph 10 as to the amount of taxes paid by plaintiff, and time of payment, but denies the remainder of allegations of Paragraph 10 of plaintiff's complaint.

Wherefore, defendant prays that the plaintiff's complaint be dismissed at its cost; and for all general and equitable relief, etc.

(Sgd.) Francis P. Burns, City Attorney, Howard W. Lenfant, Assistant City Attorney, City Attorney; City of New Orleans, City Hall.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Number and Title omitted]

JUDGMENT

This cause came on to be heard before the Court on January 14, 1946, and on January 15, 1946, and was argued by counsel, and thereupon upon consideration thereof:

It is ordered, adjudged and decreed, that there be judgment herein in favor of the Mississippi Valley Barge Line Company and against Lionel G. Ott, Commissioner of Public Finance and Ex-Officio Treasurer of the City of New Orleans, as substituted defendant for Jess S. Cave, Commissioner of Public Finance and Ex-Officio Treasurer of the City of New Orleans, in the sum of \$11,373.21, with interest at the rate of 2% per annum from May 29, 1944, until paid, and all costs.

October 16, 1946.

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS
DIVISION

Civil Action No. 845

MISSISSIPPI VALLEY BARGE LINE COMPANY

VS.

JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer

NOTICE OF APPEAL TO UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Court Aforesaid:

Notice is hereby given that Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans substituted Public Officer for Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, defendant above named,

9

hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgement entered in this action on October 16, 1946.

(Sig.) Henry G. McCall, City Attorney. Alden W. Muller, Assistant City Attorney. Howard W. Lenfant of Counsel, Attorneys for Appellant Lionel G. Ott, Room 203 City Hall, New Orleans, La.

New Orleans, La., January 13, 1947.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Number and Title omitted]

ORDER FIXING SUPERSEDEAS BOND—Filed January 13, 1947

To the Honorable Court Aforesaid:

On motion of Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, substituted successor of Public Officer Jess S. Cave, appearing herein through undersigned counsel, and on suggesting to this Honorable Court that mover and defendant herein, the said Lionel G. Ott, in his said official capacity, desires to file a notice of appeal and also at the same time desires to file a supersedeas bond for stay of execution under judgment rendered by the Trial Court in this matter;

And on further suggesting to this Honorable Court that the money sought to be recovered in this cause is being kept separate and apart and segregated from the general funds of mover herein and is therefore amply secured in accordance with Rule 73 subsection (d) of the Federal Rules of Civil Procedure and that a supersedeas bond in the full amount of the judgment is therefore unnecessary.

It Is Ordered that defendant, Lionel G. Ott, in his said official capacity, mover herein, be and he is hereby authorized and permitted to file a supersedeas bond in the amount of Two Hundred Fifty Dollars (\$250.00) in the above numbered and entitled matter and that the execution of judgment be stayed in this matter to the same extent and pur-

pose as if a supersedeas bond had been given in the full amount of judgment rendered herein.

New Orleans, La., January 13, 1947.

(Sig.) Wayne G. Borah, Judge.

(Sig.) Henry G. McCall, City Attorney. (Sig.) Alden W. Muller, Assistant City Attorney. (Sig.) Howard W. Lefant, Of Counsel, for Mover and Defendant herein, Room 203, City Hall, New Orleans, La.

Plaintiff, Mississippi Valley Barge Line Company, through undersigned counsel, does hereby waive notice and hearing on the above motion and concurs therein and consents and agrees that supersedeas bond in the amount of \$250.00 is ample and sufficient in this matter.

(Sig.) Arthur A. Moreno, Attorneys for Plaintiff.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Number and Title omitted]

SUPERSEDEAS BOND—Filed January 13, 1947

Know all men by these presents, that I, Lionel G. Ott, substituted Public Officer for Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, as principal and American Employers' Insurance Co. of Boston, as surety, are held and firmly bound unto Mississippi Valley Barge Line Company, in the sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Mississippi Valley Barge Line Company, its attorneys, successors and assigns, jointly and severally.

Sealed with our seals and dated this 13th day of January, 1947.

Whereas, on October 16, 1946, in an action in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, between Mississippi Valley Barge Line Company, plaintiff and Lionel G. Ott, defendant, a judgment was rendered against the said Lionel G. Ott and the said Lionel G. Ott has duly filed a notice of appeal from said judgment.

Now, the condition of this bond is that if the said Lionel G. Ott shall prosecute his appeal with effect and satisfy the

said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full or such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

L. G. Ott, American Employers' Insurance Company, by Hilton Sandoz, Attorney-in-fact.

Witnesses: Alden W. Muller, Mildred C. Stoddard.

Approved this — day of —, 1947.

—, United States District Judge.

Hardin & Ferguson, Inc., W. Ferguson, Vice Pres.

[fol. 18] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed
February 20, 1947

Clerk, United States District Court, Post Office Building,
New Orleans, Louisiana

In accordance with Rule 75 (f) of the Rules of Civil Procedure, Mississippi Valley Barge Line Company, through its attorneys, Lemle, Moreno & Lemle, Hibernia Bank Building, New Orleans, Louisiana, and Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, substituted public officer to Jess S. Cave, through his attorneys, Henry G. McCall, Alden W. Muller and Howard W. Lenfant, City Hall, New Orleans, Louisiana, by joint stipulation, hereby designate to constitute the record of the proceedings herein for the transcript of appeal to be sent to the United States Circuit Court of Appeal, the following numbered pleadings and the motions, minutes, orders, and judgments hereinafter set forth:

1. Original Bill of Complaint, filed June 24, 1944.
2. Answer filed on July 13, 1944.
3. Minute entries appearing in submission on January 14, 1946, and January 15, 1946.

4. (Narrative of the evidence, findings of fact, conclusions of law, and order to enter judgment omitted, being incorporated in Civil Action 844, DeBardeleben Coal Corporation vs. Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer.)

5. Judgment entered October 16, 1946.

6. Notice of appeal filed January 13, 1947.

7. Motion to fix supersedeas bond filed January 13, 1947.

8. Order permitting filing of supersedeas bond entered January 13, 1947.

[fol. 19] 9. Supersedeas bond of appeal filed January 15, 1947.

10. Joint designation of contents of record.

(Sig.) Arthur A. Moreno, Lemle, Moreno & Lemle, Attorneys for Mississippi Valley Barge Line Company, Appellee. Henry G. McCall (L.), Alden W. Muller (L.), Howard W. Lenfant, Attorneys for Lionel G. Ott, Commissioner of Public Finance and Ex-officio City Treasurer, Appellant.

[fols. 20-182] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 183-186] IN THE UNITED STATES CIRCUIT COURT OF
APPEALS, FIFTH CIRCUIT

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee,

Appeal from the District Court of the United States for the
Eastern District of Louisiana

[fol. 187] IN UNITED STATES DISTRICT COURT

[Number & Title omitted]

COMPLAINT FOR RECOVERY OF TAXES PAID UNDER PROTEST—
Filed December 21, 1945

Plaintiff, American Barge Line Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its domicile in the City of Wilmington, Delaware, shows:

I. That defendant, George Montgomery is the duly appointed and qualified Tax Collector of the State of Louisiana, City of New Orleans, and is a citizen and resident of said State, being domiciled officially and actually in the City of New Orleans, Louisiana, within the New Orleans Division of this Honorable Court.

II. That this is a suit for refund of taxes in the amount of \$4,500.00 paid under protest by plaintiff to defendant, with interest thereon. Jurisdiction is founded upon diversity of citizenship and the existence of a federal question as to the validity of said taxes, under the provisions of Section 24 (1) of the Judicial Code of the United States (28 U. S. C. 41 (1)).

III. That plaintiff is engaged, among other things, in the business of transporting merchandise and cargoes of various kinds in interstate commerce, between ports situated in Pennsylvania, Louisiana, and intervening states, and, in connection with its said business, owns and operates certain towboats and barges which it is using in this business of interstate transportation upon the navigable waters of the United States.

IV. That the said towboats and barges are engaged continuously in the transportation of merchandise and cargoes of various kinds between the City of New Orleans and ports in other states, and are, from time to time, only temporarily in the State of Louisiana for the purposes of either loading or unloading cargo in, or passing through, the said State on interstate voyages.

V. That these towboats and barges have their taxing situs at the domicile of the plaintiff at Wilmington, Dela-

ware, and have not acquired any situs in the State of Louisiana.

VI. That the Louisiana Tax Commission is a body created for the purpose of fixing assessments on property having a situs in Louisiana and subject to the taxing power of that State.

VII. That the Louisiana Tax Commission has assessed, as the property of plaintiff located in, or having its situs, either legally or actually, in the State of Louisiana, the towboats and barges used by the plaintiff in interstate commerce, as aforesaid, notwithstanding and against the protest of plaintiff that such marine equipment did not have any taxing situs in the State and are instrumentalities of interstate commerce, and not subject to the taxing power of the State of Louisiana.

VIII. That the Louisiana Tax Commission has assessed [fol. 189] plaintiff's towboats and barges on a mileage basis, proportioned to the number of miles assumed to have been traversed by said towboats and barges in Louisiana, and assumed to have been traversed by said towboats and barges in other states.

IX. That the Louisiana Tax Commission had and has no knowledge of the number of miles traversed by said towboats and barges in the State of Louisiana, and had and has no knowledge of the number of miles traversed by said towboats and barges in other states.

X. That the Louisiana Tax Commission does not know and did not know at the time of the assessment whether or not all of the towboats and barges of plaintiff came into the State of Louisiana in the year 1944.

XI. That the Louisiana Tax Commission, either through the members of the said Commission, or through any of its employees, has never viewed, nor inspected said towboats and barges, nor has the Louisiana Tax Commission, nor any of its employees, appraised said towboats and barges to fix the true value thereof, but the Louisiana Tax Commission has assumed that each towboat is valued at \$50,000.00, and each barge at \$20,000.00, based upon the fact that other companies engaged in like business have returned some of their towboats at \$50,000.00, and their barges at \$20,000.00.

XII. That the Louisiana Tax Commission, in fixing these values, has placed an arbitrary valuation of \$20,000.00 on each barge without regard to whether some of the barges are worth more and some worth less and without any actual appraisement, but upon the simple assumption that the towboats and barges are worth exactly the same amount as the assessment of barges and towboats belonging to others [fol. 190] and without regard to the actual value of the property of plaintiff as ascertained by examination and appraisal.

XIII. That it has given to all the towboats and barges, without knowledge as to how many have come within the State, and how many have not come within the State, an arbitrary value and based upon that value, has assessed in Louisiana its towboats and barges at a valuation of \$400,000.00, as the proportionate value of the towboats and barges used in Louisiana, proportioned to the number of miles in Louisiana to the whole number of miles between Pittsburgh, Pennsylvania, and New Orleans, Louisiana; and between Cincinnati and New Orleans, between which points its towboats and barges operate.

XIV. That the Louisiana Tax Commission did not know and does not know what particular towboats and barges belonging to plaintiff enter the State of Louisiana, and how long said towboats and barges remain in the State of Louisiana.

XV. That the Louisiana Tax Commission does not know the mileage of these towboats and barges, or the mileage of any particular towboat and barge in the other states and in Louisiana, and does not know the total mileage of said towboats and barges throughout the routes of transportation traversed by said towboats and barges, and does not know by viewing and appraising the value of such property.

XVI. That the said assessment is arbitrary and capricious, because the Louisiana Tax Commission does not know the actual value of the towboats and barges of plaintiff, and is without power to assess on a mileage basis, and, even if it did have such power, is unable to state the mileage of [fol. 191] these barges and towboats in other states and the mileage in Louisiana.

XVII. That the Louisiana Tax Commission requested values of plaintiff's property used in Louisiana, but was

advised by plaintiff that its watercraft equipment was not subject to taxation in Louisiana, and because of that fact put an assessment of \$400,000.00 without viewing the towboats and barges and without putting a value on each.

XVIII. That because the Louisiana Tax Commission was not given the information it requested of plaintiff, it thereupon placed an arbitrary and capricious assessment upon the property of plaintiff.

XIX. That this assessment was based upon no known fact of the actual property in the State of Louisiana belonging to the plaintiff at the time of the assessment, but the assessment was made upon an arbitrary basis and without a knowledge of the property in Louisiana, or the value of said property, because of the refusal of plaintiff to furnish facts to the Louisiana Tax Commission as requested.

XX. That, as a matter of fact, much of the property belonging to plaintiff, and entering into the assessment of \$400,000.00, was never in the State of Louisiana.

XXI. That notwithstanding the Louisiana Tax Commission took the entire value of the towboats and barges of plaintiff, whether within or without the State of Louisiana, and based its assessment proportioned to an unknown mileage of said towboats and barges traversed in the State of Louisiana, fixed an assessment of \$400,000.00.

[fol. 192] XXII. That the assessment of the property of plaintiff was not based upon its status as of August 1, 1944.

XXIII. That if the Louisiana Tax Commission pretended to act under Act 59 of 1944, plaintiff avers that said Act is unconstitutional and in violation of the Constitution of Louisiana and the Fourteenth Amendment of the Constitution of the United States as taking the property of plaintiff without due process of law, because said Act permits the Louisiana Tax Commission to apply to the assessment of the property of plaintiff methods that are unreasonable, capricious and arbitrary, and to use standards of measurements of value which have no relationship whatsoever to the value of the property of the plaintiff for purposes of assessment.

XXIV. That said Act pretends to confer upon the Louisiana Tax Commission the power to use the property of plaintiff, situated in other States, and never coming into Louisi-

ana, as a measure of the tax, notwithstanding its towboats and barges are not part of an integrated system, but are individual entities, which are subject to valuation individually and without relationship to any other towboats or barges owned by plaintiff.

XXV. That based upon an assessment of said towboats and barges in the sum of \$400,000.00 made by the Louisiana Tax Commission, defendant, George Montgomery, in his capacity as State Tax Collector for the City of New Orleans, has demanded of plaintiff the payment of an ad valorem personal property tax for the year 1945, based upon the above described assessment of its towboats and barges.

XXVI. That unless plaintiff had paid, or would hereafter pay such tax, its property would have been seized and sold in satisfaction thereof, and accordingly plaintiff paid to the [fol. 193] said George Montgomery, State Tax Collector for the City of New Orleans, on the 14th day of December, 1945, the sum of \$4,500.00.

XXVII. That at the time of such payment, plaintiff protested in writing against its exaction as unlawful and unconstitutional and requested that the said George Montgomery, State Tax Collector for the City of New Orleans, segregate the said amount of money under the terms of Act 330 of 1938.

XXVIII. That the said George Montgomery, State Tax Collector for the City of New Orleans, as per copy of a letter dated December 17, 1945 advised plaintiff that the sum of \$4,500.00 would be segregated until a final determination of a suit, if any, which the plaintiff might bring.

XXIX. That the assessment for taxation of the aforesaid marine equipment was and is void and unconstitutional as violative of Article 1, Section 8, of the Constitution of the United States, as being a direct tax on interstate commerce and as a direct tax on an instrumentality of interstate commerce and a tax on the right to use the navigable waters of the United States for interstate commerce.

XXX. That the said assessment and the collection of taxes thereupon is violative of the 14th Amendment to the Constitution of the United States and Article 1, Section II, of the Bill of Rights of the Constitution of Louisiana, as

taking the property of plaintiff without due process of law, because the said property had never acquired a situs in Louisiana and has never become subject to the taxing power of the State of Louisiana.

XXXI. That even if said property had acquired a situs in Louisiana, and so subject to the taxing power of that [fol. 194] state, because of its situs, which is denied, plaintiff avers that said assessment was illegal, arbitrary and capricious as being founded upon no known fact of value, but was an assessment arbitrarily imposed upon plaintiff's property because of the claim by plaintiff that said property was not subject to taxation, and, consequently, no return of said property for taxation by the State of Louisiana could be rightfully demanded.

Wherefore, plaintiff demands judgment against defendant, George Montgomery, State Tax Collector for the City of New Orleans, for the sum of \$4,500.00 with 2% per annum interest from December 14, 1945 until paid, and for all costs.

(Sgd.) Arthur A. Moreno, Selim B. Lemle, Louis G. Lemle, Attorneys, American Barge Line Company.

625 Hibernia Building, New Orleans, Louisiana.

[fol. 195] IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

ANSWER—Filed November 11, 1946

To the Honorable Court Aforesaid:

Now into Court, through his undersigned counsel, comes George Montgomery, State Tax Collector for the City of New Orleans in his said official capacity, and for answer to the Plaintiffs complaint denies, all and singular, the allegations thereof, except such as may hereinafter be specifically admitted, and now answering said complaint Article for Article, avers and says:

I

The allegations of Article I of plaintiff's complaint are admitted.

II

Defendant admits that this is a suit for a refund of taxes but denies the remainder of the allegations of Article II of Plaintiff's complaint;

III

For lack of sufficient information to justify a belief with respect thereto, respondent denies the allegations of Article III of plaintiff's complaint except that certain towboats and barges belonging to the plaintiff are operating in navigable waters situated within the State of Louisiana, inclusive of the Port of New Orleans.

IV

For lack of sufficient information to justify a belief with respect thereto, respondent denies the allegations of Article IV of said complaint except that certain towboats and barges belonging to the plaintiff are operating in navigable waters situated within the State of Louisiana, inclusive of the Port of New Orleans.

V

Respondent denies the allegations of Article V of plaintiff's complaint.

VI

Respondent admits the allegations of Article VI of plaintiff's complaint, and further states that the Louisiana Tax Commission has the right and power to fix assessments on [fol. 196] the property owned by the plaintiff and which is the subject of the tax herein.

VII

Defendant admits the allegations of Article VII of Plaintiff's complaint and further avers and sets forth that the Louisiana Tax Commission has the right and power to fix assessments on the property owned by the Plaintiff and which is the subject of the tax herein questioned; that it is the duty imposed by law on said Louisiana Tax Commission to assess the property of the Plaintiff and that in so doing, it has complied with the Law of the State of Louisiana. As to the allegations and conclusions of law set forth in this Article of plaintiff's complaint, he is not required to make answer thereto.

VIII

Respondent admits the allegations of Article VIII of said complaint but avers that, if there is any error in the mileage, as computed by the Louisiana Tax Commission, such error was due to the refusal of the plaintiff to give said Commission any information at all concerning its property and the use thereof in and out of the State of Louisiana, and further avers that the plaintiff, by reason of its failure and refusal to make a return of its property to the Louisiana Tax Commission and to take any legal action to correct the same before the payment of the taxes levied, is now estopped from attacking said assessment on any ground other than the absence of the right of the State to tax the property at all, and said assessment must stand or fall as whole.

IX.

Respondent admits the allegations of Article IX of said complaint, but avers that, if it had a legal right to assess plaintiff's property at all, for purposes of taxation, the Louisiana Tax Commission had the right to base said assessment upon such information as was available to it, in view of the refusal of the plaintiff to make a return of its property or to furnish any information concerning it.

X

Respondent admits the allegations of Article X of said complaint, but avers that, if it had a legal right to assess plaintiff's property at all for purposes of taxation, the Louisiana Tax Commission had the right to base said assessment upon such information as was available to it, in view of the refusal of the plaintiff to make a return of its property or to furnish information concerning it.

XI

Respondent admits the allegations of Article XI of said complaint and avers that the Louisiana Tax Commission had the right to compute the assessment in the manner alleged for the reasons given in preceding articles of this answer.

XII

Aside from the allegations that the assessment of Plaintiff's property was an arbitrary one, which is denied, De-

defendant admits the allegations of said Article XII of the complaint and further answering states, that the Louisiana Tax Commission was compelled to make the assessment of Plaintiff's property according to its best judgment and in accordance with law, the Plaintiff having neglected, declined and refused to furnish the said Tax Commission with any information upon which any other assessment could be based, and accordingly the Plaintiff is estopped from complaining about both the method and the amount of the assessment upon which the tax was predicated.

[fol. 197]

XIII

Respondent admits the amount of the assessment, but denies it is an arbitrary assessment, and avers that it had a right to so compute the assessment complained of in view of plaintiff's conduct as averred in preceding articles of this answer; respondent denies the remainder of the allegations of Article XIII of Plaintiff's complaint for lack of sufficient information to justify a belief.

XIV

Respondent admits the allegations of Article XIV of said complaint.

XV

Respondent admits the allegations of Article XV of said complaint.

XVI

Respondent denies the allegations of Article XVI of said complaint.

XVII

Respondent admits the allegations of Article XVII of said complaint and avers that the Louisiana Tax Commission had the right to assess the property on the basis of available information and assessed the same on the mileage basis as authorized by Louisiana Act 170 of 1898, Sec. 29, as amended by Act 152 of 1932 (Dart's Statutes, Sec. 8370), as amended by Act 59 of 1944.

XVIII

Respondent denies the allegations of Article XVIII of said complaint and avers that the Louisiana Tax Commission could and did base its assessment of plaintiff's

property on information available to it, and that the plaintiff, for the reasons assigned in preceding Articles of this answer, has no right to attack the method employed in arriving at said assessment, but must confine its attack to the right of said commission to assess its property at all for purposes of taxation.

XIX

Answering Article XIX, Respondent avers that the same is but a reiteration of other allegations of the complaint and is denied for the reasons given in preceding article hereof.

XXI

Answering Article XXI, respondent admits that the Louisiana Tax Commission, in arriving at said assessment, used the entire value of the plaintiff's towboats and barges proportioned to the mileage of the same in the State of Louisiana, computed on the basis of information available to it and which may have been more accurate had the plaintiff not persisted in its refusal to give said Commission any information concerning its property and the mileage traversed by the same in and out of the State of Louisiana, but denies for lack of information that any of the property included in the assessment was never in the State of Louisiana, and reiterates his denial of plaintiff's right to reduce said assessment or to attack it for any reason other than the absence of the constitutional right of the State of Louisiana to tax the property at all.

[fol. 198]

XXII

Respondent denies the allegations of Article XXII of plaintiff's complaint.

XXIII

Respondent denies the allegations of Article XXIII of plaintiff's complaint.

XXIV

Answering Article XXIV of plaintiff's complaint, respondent avers that said act speaks for itself and denies the remainder of the allegations of this article for lack of sufficient information to justify a belief.

XXV

Respondent admits the allegations of Article XXV of plaintiff's complaint.

XXVI

Respondent admits the allegations of Article XXVI of plaintiff's complaint.

XXVII

Respondent admits the allegations of Article XXVII of plaintiff's complaint.

XXVIII

Respondent admits the allegations of Article XXVIII of plaintiff's complaint.

XXIX

Respondent denies the allegations of Article XXIX of plaintiff's complaint.

XXX

Respondent denies the allegations of Article XXX of plaintiff's complaint.

XXXI

Respondent denies the allegations of Article XXXI of plaintiff's complaint.

XXXII

Nor further answering, Defendant avers, on information and belief, that none of the Plaintiff's towboats and barges, subject to the estimate upon which the tax herein sued for was predicated and based, are not or ever have been in the State of Delaware and that Plaintiff is not now paying and has never paid to any other State, any taxes on said property, the sole and only taxes which were paid and collected were those paid under protest to the State of Louisiana, herein sought to be recovered and those paid to the City of New Orleans; the recovery of which is the basis of another suit in this Honorable Court.

[fols. 199-206] Wherefore Defendant prays that the Plaintiff's suit be dismissed at its costs and for general and equitable relief and for all need orders in the premises.

(Sig.) Fred S. LeBlanc, Attorney General of Louisiana, Baton Rouge, Louisiana, per Cahn. W. C. Perraut, Second Assistant Attorney General, Baton Rouge, Louisiana, per Cahn. Bertrand L. Cahn, Special Assistant Attorney General, New Orleans, Louisiana, Civil Courts Building.

Certificate of Service

I certify that a copy of the foregoing answer has been mailed, sufficient postage prepaid, to Mr. Arthur A. Moreno, opposing counsel, addressed to his office, 625 Hibernia Bank Building, New Orleans, Louisiana.

(Sig.) Bertrand I. Cahn, Attorney for Defendant,
Civil Courts Building, New Orleans, Louisiana.

[fol. 207] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

Appeal from the District Court of the United States for the
Eastern District of Louisiana

[fols. 208-210] **Joint Agreement and Order as to Printing
of Records in Companion Cases on Ap-
peal and as to Judgments—Filed October
1, 1947**

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

No. 12116

DEBARDELEBEN COAL CORPORATION

versus /

**JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer**

AND TEN (10) OTHER COMPANION CASES, VIZ:

No. 12117

MISSISSIPPI VALLEY BARGE LINE COMPANY

versus

**JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer**

No. 12118

MISSISSIPPI VALLEY BARGE LINE COMPANY

versus

**GEORGE MONTGOMERY, State Tax Collector for the City of
New Orleans**

No. 12119

AMERICAN BARGE LINE COMPANY

versus

**JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer**

AMERICAN BARGE LINE

versus

GEORGE MONTGOMERY, State Tax Collector for the City of
New Orleans

No. 12121

AMERICAN BARGE LINE COMPANY

versus

JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer

No. 12122

MISSISSIPPI VALLEY BARGE LINE COMPANY

versus

JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer

No. 12123

UNION BARGE LINE CORPORATION

versus

JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer

No. 12124

DEBARDELEBEN COAL CORPORATION

versus

JESS S. CAVE, Commissioner of Public Finance and
Ex-Officio City Treasurer

[fol. 212]

No. 12125

MISSISSIPPI VALLEY BARGE LINE COMPANY

versus

GEORGE MONTGOMERY, State Tax Collector for the City of
New Orleans

No. 12126

AMERICAN BARGE LINE COMPANY

versus

GEORGE MONTGOMERY, State Tax Collector for the City of
New Orleans

STIPULATION

Since the above cases present the same questions of law and similar questions of fact, and since they were consolidated for hearing before the United States District Court and were disposed of by the District Court in one opinion, it is stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that with the permission of this Honorable Court, which is hereby prayed for, the above numbered and entitled eleven cases shall be consolidated for briefing and hearing in this Court, and that the record in only one case, that of De-Bardeleben Coal Corporation vs. Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer, Circuit Court of Appeal Docket No. 12316, shall be printed; and it is further agreed that separate judgments be rendered in each of the above numbered and entitled eleven causes based upon the Court's findings of fact as applied to each case and the law applicable thereto.

[fol. 213] Thus Done and Signed in Duplicate at New Orleans this 25th day of September, 1947 A. D.

(Signed) Arthur A. Moreno, Attorney for Plaintiffs and Appellees, Hibernia Bank Building, New Orleans, La.; Henry G. McCall (L), Alden W. Muller (L), Fred S. LeBlanc (L), H. C. Perrault (L), B. I. Cahn (L), H. W. Lenfant, Attorneys for Defendants and Appellants, Room 203, City Hall, New Orleans, La.

ORDER

It Is Ordered by the Court, that the above numbered and entitled eleven causes be consolidated for briefing and hearing; that the record is only one cause that of DeBardeleben Coal Corporation vs. Jess S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer, Circuit Court of Appeal Docket No. 12116, shall be printed; and that separate judgments be rendered in each of the above numbered and entitled eleven causes based upon the findings of fact as applicable in each of these respective causes and the law applicable thereto.

(Signed) J. C. Hutcheson, Jr.; Judge, United States Circuit Court of Appeals for the Fifth Circuit.

September 30, 1947.

[fols. 214-221] IN DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

No. 844 (Civil Action)

DEBARDELEBEN COAL CORPORATION, Plaintiff-Appellee,

vs.

JESS S. CAVE, City Treasurer, Defendant-Appellant

APPEARANCES:

Messrs. Fred S. LeBlanc, W. Charles Perrault, Bertrand I. Cahn, Henry G. McCall, Alden W. Muller, Howard W. Lenfant, Attorneys for Appellant.

Messrs. Lemle, Moreno & Lemle (Arthur A. Moreno, Esq., & Selim B. Lemle, Esq.), Attorneys for Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 13th day of January, 1947, at the City of New Orleans, Louisiana

Extensions of time granted by the Honorable United States District Court, Eastern District of Louisiana and the Honorable United States Circuit Court of Appeals for the Fifth Circuit, bringing the return day up to and including September 10th, 1947.

[fol. 222] IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

Extract from the Minutes

January 14th, 1947

TRIAL ON MERITS, HEARING IN PART AND CONTINUANCE

CAILLOUET, J.

The above consolidated causes came on this day for trial before the Court on the merits;

Present: Arthur A. Moreno, Esq., John R. Johnson, Esq., Attorneys for the Plaintiff;

Howard W. Lenfant, Esq., Assistant City Attorney appearing on behalf of Jesse S. Cave, Commissioner of Public Finance, City of New Orleans;

W. C. Perrault, Esq., Assistant Attorney General, State of La., appearing on behalf of George Montgomery, State Tax Collector, defendants.

Whereupon, by agreement of counsel and with consent of the Court, it was stipulated that cause No. 1188 Civil Action, entitled Union Barge Line Corporation versus Jess S. Cave, Commissioner of Public Finance, City of New Orleans, should be included in the trial of the above consolidated causes.

Thereupon, after hearing statements of counsel for the respective parties, the following named witnesses were [fol. 223] called, sworn by the deputy clerk, and testified on behalf of the plaintiff:

J. H. Kane
Chas. C. Zatarain
Hunter H. Huckaby
John H. Fetzer

Sidney J. Mann
John J. Brennan
John C. Calhoun
J. Sterling Davis

and, after hearing the evidence and testimony offered on behalf of the plaintiff, counsel for said plaintiffs, produced, offered and with leave of Court, filed transcripts of testimony of the following witnesses:

G. C. Taylor
P. B. Lansing

Henry F. DeBardeleben
E. G. Louis Guidry

Whereupon, counsel for plaintiffs asked leave of the Court to amend the complaint of the Union Barge Line Corporation to show that the corporation is a Pennsylvania Corporation, instead of a Delaware Corporation, and counsel for defendants offering no objection thereto, leave is granted.

Counsel for the plaintiffs then announced that they would close their evidence and testimony in chief, and it was ordered that the cause be continued until tomorrow at 10:00 o'clock A. M. for further proceedings.

[fol. 224] IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

Extract from the Minutes

January 15th, 1946

FURTHER HEARING AND SUBMISSION

CAHENQUET, J.

This consolidated cause, as continued from yesterday, was this day resumed. Counsel for the respective parties all being present, the trial was proceeded with.

Whereupon, the following witnesses, being sworn by the Deputy Clerk of Court, testified on behalf of defendants:

Calvin T. Bayard,
John A. McNiveu,
Frank B. Rivard,

Capt. F. G. Aragon,
E. B. McCary.

Whereupon, at the conclusion of the evidence and testimony offered on behalf of the defendants, counsel for the respective parties announced to the Court that they would rest.

Whereupon, counsel for plaintiff, in the case of Union Barge Line Corp., versus Jess S. Cave, Commissioner of Public Finance, No. 1188 Civil Action, announced to the Court, that although this matter was not on trial, that all the issues were identical and requested leave to include this case for decision with the cases on trial herein this day, and counsel for the other parties being present, and

agreeing thereto, it was ordered that this cause be considered [fol. 225] consolidated with all other causes and submitted.

Thereupon, it was ordered by the Court, that plaintiff have ~~until~~ January 31, 1946 at 12:00 o'clock noon to file briefs and that defendants have until February 11, 1946, at 12:00 o'clock noon to file reply briefs; this matter not to be considered submitted until all briefs are filed in the Clerk's Office.

IN UNITED STATES DISTRICT COURT

Consolidation

[Number and Title Omitted]

OPINION—Filed September 5, 1946

CAILLOUET, J.:

These eight suits were consolidated for the purpose of trial, the pleadings in each being, substantially, of the same general pattern.

Each one of the four plaintiffs in interest in said suits seek to recover from the Commissioner of Public Finance and ex-officio Treasurer of the City of New Orleans, and from the State Tax Collector for the City of New Orleans, respectively, a stated sum of money paid, under protest, in settlement of claimed ad valorem taxes levied under assessments made by the Louisiana Tax Commission, upon and against certain watercraft of the plaintiff in interest. Each such plaintiff, resisting payment, having availed itself of the provisions of the Act No. 330 of 1938 (6 Dart Louisiana General Statutes, 8444.1-8444.3), and the sum paid, in each instance, having been duly segregated and being still so held, pending the outcome of the particular suit relating thereto.

[fol. 226] The original defendant Commissioner of Public Finance and ex-officio City Treasurer, in four of said eight suits, having been succeeded in office by Lionel G. Ott, substitution was effected in due course, under the provisions of Rule 25 (d) of the Federal Rules of Civil Procedure, and each plaintiff now seeks judgment against said substituted officer, in lieu and in stead of Jess S. Cave, whose term of office has expired.

At the trial, the parties stipulated that the decision reached herein shall be controlling in like suits filed by the plaintiffs, respectively, relative to collected "taxes" of 1945.

In each suit, the plaintiff in interest contends that its corporate domicile is beyond the borders of the State of Louisiana and that none of its "taxed" property, all of which plaintiff operates in interstate commerce traffic upon navigable waters of the United States, has ever acquired a situs within this State.

It is uncontroverted that none of the watercraft of either the American Barge Line Company, DeBardeleben Coal Corporation, and Mississippi Valley Barge Line Company was ever physically present within Delaware, the State of their incorporation, but some, if not all, of the "taxed" property of the Union Barge Line Corporation was so present within Pennsylvania, under whose laws this particular plaintiff was created and enjoys corporate existence, as is made to appear by said plaintiff's amended complaint and the evidence.

The complaints all aver, substantially, that the assessment of plaintiffs' respective watercraft and marine equipment by the Louisiana Tax Commission was without authority of law because said tangible property had no tax situs [fol. 227] within the State of Louisiana, having only repeatedly come into the State as occasion demanded while in interstate commerce movements, and for that purpose alone, and having remained in Louisiana only so long as such interstate commerce operations on the State's navigable waters made necessary.

Furthermore, plaintiffs allege that all such assessments so made by said Tax Commission were otherwise illegal in that they were predicated on a mileage basis, arrived at by assuming a certain number of miles to have been traveled by plaintiffs' respective watercraft during the tax year on the navigable waters of Louisiana and likewise assuming, by contract, a certain mileage traveled by said marine equipment beyond the borders of the State, and then establishing, proportionately, the tax claimed to be due in Louisiana; said Tax Commission not having known, in any instance, the actual mileage traveled, nor having known whether or not all of the watercraft and marine equipment of the plaintiff in interest had come into the State of Louisiana during said tax year.

Plaintiffs also plead and urge that all such assessments were furthermore capricious and arbitrary, because they were actually made without knowledge of the value of any of the "taxed" property and rested solely upon the assumed existence of arbitrarily adopted values; and, finally, that the assessment and collection of the taxes, which plaintiffs now seek to recover, were and are unconstitutional, inasmuch as the same violates the 14th Amendment to the Constitution of the United States, and Article 1, Section 2, of the Bill of Rights of the Constitution of Louisiana, by taking property without due process of law. [fol. 228] To all of which contentions, defendants make reply, substantially, as follows:—the taxes collected impose no unconstitutional burden upon interstate commerce; their assessment and collection do not violate the constitutional requirement of due process; the Tax Commission's criticized manner of assessing was resorted to, because the plaintiffs arbitrarily withheld pertinent information from the Commission when requested by it to supply the same for the purpose of assessment; the method of assessment adopted was in compliance with the provisions of the amended Section 29 of Act 152 of 1932 (6 Dart Louisiana General Statutes, § 8370), which direct that "rolling-stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this state and partly within another state, or states, or whose sleeping cars run over any line lying partly within this state or partly within another state or states, shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire lines."

Subsequent to the trial, the cause was re-opened upon joint request of the parties, for the purpose of admitting as evidence their written stipulation to the effect that:

"The Louisiana Tax Commission, in accordance with Louisiana Law, preparatory to making an assessment on the watercraft equipment of each of the plaintiff corporation, requested definite information from each corporation as to the number of their watercraft, the value of each vessel, the total mileage travelled by said watercraft in Louisiana waters during the taxable years in question, as compared to the total mileage traversed by

said watercraft during the said taxable years, and other pertinent information in connection therewith and in [fol. 229] each case the plaintiff corporations refused to furnish this specific information, whereupon the Louisiana Tax Commission assessed, based upon the best information available to the said commission, as shown by the testimony of J. H. Cain, C. C. Zatarain, H. H. Huckaby, John H. Fetzer and Sidney J. Mann, the total valuation of the watercraft owned by said plaintiff corporations and allotted to Louisiana a percentage thereof which the Louisiana Tax Commission believed to be the correct proportion of the mileage traversed by said water craft in Louisiana as compared to the mileage traversed over the entire water route of said plaintiff corporation."

Considering the stipulation entered into between the parties and the testimony adduced from witnesses at the trial (or produced thereat by depositions), as well as the documentary evidence forming part of the respective records, it is found that the paid taxes sought to be recovered are those relating to the years 1944 and 1945; except that, as to Union, the taxes involved are those of 1945.

The following other facts are likewise found, viz:

(1) The American Barge Line Company, which will hereafter be referred to simply as American, while the names of the remaining three plaintiffs, for the like reason of brevity and convenience, will be written: Mississippi Valley; Union, and DeBardeleben, respectively, is, as previously stated, a Delaware corporation, and so are Mississippi Valley and DeBardeleben. None of the stockholders of either American or Mississippi Valley reside in Delaware, and the great majority of the DeBardeleben stockholders are likewise non-residents thereof. None of the officers and directors of either of said three named [fol. 230] corporations reside in Delaware, but the designated agent of each for the service of process in that State, Trust Corporation of Delaware, is there domiciled.

Union is a corporation organized and existing under the laws of Pennsylvania, with its domicile in the City of Pittsburgh, said State, where it maintains its principal business office.

Each of the four named corporations are lawfully engaged in transportation of freight upon inland waters of the United States, under authority of a certificate of

public necessity and convenience issued to each by the Interstate Commerce Commission.

The "taxed" towboats of American and DeBardeleben are enrolled under the United States shipping regulations pertaining to vessels engaged in domestic commerce (Title 46, Chap. 12, U. S. C. A.) at Wilmington, Delaware, and there, too, they have voluntarily registered their barges; while the towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi Valley are enrolled at St. Louis, Missouri. But this has little or no bearing, as concerns the place of taxation. (51 Am. Jur. (1944), 913, pp. 807-809.)

Under neither Delaware nor Pennsylvania law, is such marine equipment ~~as is used in interstate commerce~~ by American, Mississippi Valley, DeBardeleben, and Union, respectively, subject to state taxation.

(2) The towboats of American regularly operate between Pittsburgh and New Orleans, and occasionally make a trip from St. Louis to New Orleans. Its barges ply on the Mississippi and Ohio Rivers, between Pittsburgh and New Orleans, and up the Cumberland, the [fol. 231] Tennessee, the Monongahela and Kanawha Rivers, they operate, also, between Pittsburgh and Palmyra, Arkansas, and on the Intracoastal Canal.

Steel products originating in the Pittsburgh territory generally compose the downstream cargoes of American, whether destined for, say, Louisville, Kentucky, Memphis, Tennessee, New Orleans, on the Mississippi River, or Houston, Texas, on the Intracoastal Canal.

American has no warehouse at New Orleans, no stevedoring department, and operates no terminal there, as it does at Glassport, Pennsylvania, and at Louisville and Memphis, respectively. In its operations beyond New Orleans, it transfers loaded barges to the motive power of like water transportation services.

All of its downstream tows it delivers to Whiteman's Landing, Algiers, on the west bank of the Mississippi, in New Orleans, and from this point leaves on all of its upstream return trips.

Cargo consigned to New Orleans is then transferred from Whiteman's Landing to city docks (at whatever space thereon indicated by the respective consignee) and there unloaded by Mississippi Valley, under an arrange-

ment between it and American, but when a particular cargo is destined for a point beyond New Orleans, the carrying barge or barges are picked up at the Landing by a vessel making the Intracoastal canal trip towards Houston, for instance, or, perhaps, by one proceeding further down the Mississippi to Port Sulphur or other nearby river point; none of which, American owns or operates.

[fol. 232] In the steady flow of interstate commerce so moved by American as far south as New Orleans, several towboats and many barges are used. One towboat may start a trip from Pittsburgh only to be substituted by one or more towboats on the way south, and some or all of the loaded barges making up the initial tow may be delivered to consignees at intervening ports, such as Louisville, Memphis, and Palmyra, Arkansas, to be replaced by loaded barges there awaiting transportation downstream, so that no special towboat or barge is allocated to service on any particular leg of the voyage, and barges are made available as and where tonnage is offered for transportation. The tow load on any trip is always maintained, as nearly as practicable, of such number of barges and cargo weight as insures the towboat's pushing ahead at maximum efficiency.

All of the foregoing holds true, likewise, on return or upstream trips from New Orleans.

Now towboat is permitted to remain in port any longer than is necessary to deliver cargo and to take on barges; at New Orleans, no longer than it takes to break up the downstream tow at Whiteman's Landing, and to then make up a tow for the return trip up the Mississippi.

There is sometimes a slight delay awaiting the delivery of loaded barges for the return trip, because seldom are empties towed upstream but some are sent down to New Orleans to load northward-bound tonnage offered. But consistent effort is made to expedite all return trips, inasmuch as it is only by keeping the watercraft on the move that money is made, as American's acting superintendent of transportation expressed it in testifying.

[fol. 233] Petroleum products, in the main, constitute American's upstream tows, although there are cargoes of alcohol and sugar. These cargoes are assembled at Whiteman's Landing, delivery being effected there from Texas

and Louisiana points, for their inclusion in American's upstream operations.

American, by means of its wholly-owned subsidiary, Jeffersonville Boat and Machine Works, with plant located at Jeffersonville, Indiana, across the Ohio River from Louisville, Kentucky, where American maintains its chief business office, employing no less than 25 persons, does all general repair and overhaul work upon its marine equipment, but emergency repairs on a trip are necessarily done at the nearest boatways available.

In 1943 and 1944 American maintained a constant heavy traffic to and from New Orleans. It owned slightly less than 200 barges and 10 towboats, 9 of which were kept in operation, but 4 of them never came to New Orleans, and neither did some of its barges, but others did come rather constantly. In 1944 American added under charter from the Defense Plant Corporation, 4 towboats and 40 barges to its marine equipment so being used in interstate commerce.

In 1943, American's total tonnage loaded and unloaded at various ports of call was 977,705.57 tons, 72,504.61 of which were loaded on at New Orleans, and 33,647.77 unloaded. In addition to this, there were assembled at Whiteman's Landing for American's upstream tows 18,732.63 tons, loaded at two points south of New Orleans, and 120,973.62 tons loaded at Intracoastal Canal points all the way to Houston, Texas. The total loadings leaving New Orleans in American's upstream traffic aggregated, therefore, 212,210.86 tons of the total tonnage transported in 1943, [fol. 224] or about 22% thereof. The actual loadings at New Orleans approximated 7%. (Exhibit No. 5.)

Of the total time covered by their interstate commerce operations of 1943, American's towboats spent no more than approximately 3.8% thereof within the boundaries of Louisiana.

Only five of its own tow boats moved in and out of the State, to which must be added the Java Sea, taken over, under charter, on November 24, 1943.

The schedule of time spent at the Port of New Orleans by American's said five vessels during that year shows the following state of facts, viz:

The "Jefferson" was in one or more Louisiana ports, in all months except February and April, for a total of 33 days, 7 hours, and 45 minutes, 24 hours, 7 hours, and

30 minutes of which were spent in making repairs, leaving 9 hours and 15 minutes for the vessel's usual activities such as dropping and picking up barges, taking on supplies, water, fuel, pumping out barges, etc.

The "National", in 6 months, i. e.:—April, June, August, September, October and November, for 9 days, 3 hours, and 15 minutes,—4 days, 4 hours, and 45 minutes thereof in making repairs; thus leaving but 4 days, 22 hours and 30 minutes for all other purposes.

The "Patriot" in 6 months, i. e.:—April, May, June, July, August and September, for 11 days, 10 hours, and 15 minutes,—7 days, 23 hours, and 15 minutes thereof in making repairs; leaving 3 days and 11 hours for all other purposes.

[fol. 235] The "Pioneer", in each of the 12 months, for 49 days, 7 hours, and 5 minutes,—24 days, 13 hours, and 45 minutes in making repairs; leaving 24 days, 17 hours, and 20 minutes for all other purposes.

The "Progress", in 8 months, i. e.:—February, March, April, June, July, October, November and December, for 22 days, 3 hours, and 15 minutes,—15 days, 18 hours and 10 minutes thereof in making repairs; leaving 6 days, 9 hours and 5 minutes for all other purposes.

In 1944, American made 73 such "in and out" trips, having chartered four more Defense Plant Corporation power vessels, and some forty odd barges, for use in its interstate commerce transportation service.

While in port at New Orleans, American's marine equipment has the benefit of such fire protection as is afforded all wharves, whether publicly operated at dock charges or privately maintained upon leased banks, and all watercraft moored to any of said wharves; as well as of harbor police surveillance, and of all sanitary regulations of State and City Boards of Health; but this presents no more favorable situation, so far as concerns American's interests, than exists in all like river ports which it serves, except that the Dock Board does operate two fire tugs, one of which helped to quench a fire on the tow-barge "Pioneer", in 1943, when the whole of that vessel's galley burned; which necessitated the vessel's remaining in port for 24 days thereafter, in order to effect the galley's replacement before commencement of the usual journey with a tow.

The same benefits are likewise shared by Mississippi Valley, Union and DeBardeleben, to greater or lesser degree, dependent upon their movements in and about the Port of New Orleans.

[fol:236] American never engages in Louisiana intrastate commerce operations; nor do Mississippi Valley, Union and DeBardeleben.

(3) Mississippi Valley owns 80 barges and 4 towboats, i.e. the Ohio, Indiana, Tennessee, and the Louisiana, with which it ordinarily carries on its interstate commerce transportation as a public carrier, but as increased volume of tonnage is offered at times, or in other like contingencies, temporarily chartered towboats and barges are added to the working fleet. Considering the overall period, an average of 2 to 3 towboats were so chartered and operated in 1943, and, in like manner, barges to the number of slightly less than the 80 barges owned.

No fixed number of barges or towboats, nor particular barges or boats, as such, are ever allocated to any special area within the territory covered by Mississippi Valley's water transportation operations, which begin at Pittsburgh, on the East, at St. Louis, on the west, and continue downstream to New Orleans, serving all intervening ports, including Cincinnati, Ohio, Evansville, Indiana, Louisville, Kentucky, Cairo, Illinois, Memphis, Tennessee, Vicksburg, Mississippi, and Baton Rouge, Louisiana.

Besides maintaining this regular water transportation service, Mississippi Valley also operates, on occasion, as far north as Minneapolis and on some of the tributaries of the upper Mississippi.

Usually, such barges as are unloaded at any point in discharge, are loaded at once with cargo offered for transportation, to be picked up by the next upstream or downstream tow passing by; but when it is known in advance that surplus tonnage awaits transportation on an outbound trip, all available extra equipment is dispatched to that particular terminal. Whenever empties are on hand because of lack of cargo offered, and a passing tow is sufficiently light to profitably haul the barges to other points in need of them, they are so transferred; this is done, for instance, whenever movement of cargo into New Orleans, for any period, consistently exceeds the quantity carried out on

return trips northward. Depending upon the season of the year, this process is reversed, at times.

Simply stated, boats and barges are supplied to move cargo whenever offered—no particular towboat or barge—the quantity and kind of cargo indicating however, whether large or small barges, or open or closed barges, are needed.

The sole and only purpose of Mississippi Valley's watercraft coming into Louisiana, past Baton Rouge into New Orleans, from which terminal point such towboats and barges return northward, is to deliver cargo carried in interstate commerce from out of Louisiana to Louisiana points north of New Orleans, and to the Port of New Orleans. A constant water transportation service is maintained and in 1943,—as it has been in all of the past several years,—Mississippi Valley tows arrived at New Orleans once a week or oftener. No barges are ever picked up at Baton Rouge or other Louisiana point for delivery to New Orleans; nor at New Orleans, for any Louisiana port. Loaded barges in a downstream tow are dropped at Baton Rouge, where they remain until unloaded and picked up loaded or empty on the next succeeding return trip northward. Occasionally, as required for loading surplus tonnage offered, empties are dropped at Baton Rouge. No towboat remains at that port any longer than is necessary to tie off or pick up a barge.

[fol. 238] Mississippi Valley's towboats do not travel the same route with regularity and, for instance, during a given period one or more of the boats may not come down the Mississippi as far as New Orleans, while one or more are repeating trips to the port without interruption; and barges made up in a tow, either at Pittsburgh or St. Louis, may all be dropped at intervening river points, as other loaded barges are picked up to replace them, so that the delivered tow at New Orleans may be one that has been wholly made up en route and is being pushed by other than the boat that started out on the downstream towing trip.

It is the constant aim of Mississippi Valley to unload cargo at point of destination without delay and to immediately re-load the emptied barge with available outbound cargo, so that the same may leave port on the first return trip if the loading is complete, or no later than the second, if not. When a tow reaches New Orleans, or other like terminus, the inbound tow is tied off in two units, the towboat takes on fuel, picks up the loaded outbound tow.

which awaited its coming, and immediately proceeds out of port. On occasion, however, because of limited cargo offerings, there may be delay in making up a full tow, consequently retarding the outbound trip.

But the ordinary maximum period that any towboat remains in the port of New Orleans is 12 to 48 hours, depending upon whether or not it is in need of emergency repairs. Every possible effort is made to keep the company's watercraft on the move for the greatest number of days a year inasmuch as it earns nothing when tied up. No equipment is ever laid up at any port except for temporary repairs or while awaiting outbound cargo, if not moved to another port where it is known to be more needed. At New Orleans, unless early need of an empty barge is anticipated, the same is moved to another point in order to avoid [fol. 239] accruing wharfage; and empties are moved, at times, all the way from New Orleans to Cincinnati, or in reverse direction, depending upon how the bulk of water traffic is moving at the particular season of the year. Whenever there is no need of a particular boat or barge, necessitating its being laid-up,—the vessel in question is usually tied up in Mississippi Valley's fleet at Cincinnati.

It may here be observed that, according to the evidence, the usual round-trip voyage between Cincinnati and New Orleans consumes thirty-five days.

Mississippi Valley operates a general repair shop at Cincinnati, where its boats and barges are ordinarily repaired and overhauled, except that, as a matter of course, running or emergency repairs are made wherever they are found necessary; and because Cincinnati has no drydock facilities whatever, as have Pittsburgh, St. Louis and New Orleans, whenever there is need of putting a vessel in drydock to make repairs, the same is done where the facilities therefor are more readily available, but mainly at New Orleans, or Pittsburgh.

At New Orleans, Mississippi Valley employs a maintenance man who looks after the making of all necessary temporary repairs. Those are only such as must be made to enable the affected equipment to move out of the port. If repairs are needed but the trip to Cincinnati may, nevertheless, be safely undertaken, repairing is delayed until that port is reached.

At Cincinnati, St. Louis, Cairo, Memphis, and New Orleans, Mississippi Valley maintains its own terminals where

it discharges and takes on cargo. At other ports, such as Baton Rouge, Vicksburg, Louisville, Evansville, and Pitts-[fol. 240] burgh, it makes use of public terminal facilities.

New Orleans, inasmuch as it is a port through which is shipped freight in foreign trade—of which there was considerable in 1943 and 1944 because of war conditions—receives the greatest volume of Mississippi Valley's tonnage. A portion of the same is destined for New Orleans Consignees, a part is loaded on oceangoing vessels, and some of its loaded barges are transferred to other motive power in uninterrupted towing operations westward by connecting lines, through the Intracoastal Canal, to points of destination in Louisiana or Texas.

Nevertheless, Mississippi Valley's "taxed" marine equipment rested in the port of New Orleans no more—of the total time possible—than as follows, viz:—In 1943, the four towboats, an aggregate of approximately 17.25%, and the barges, an aggregate of approximately 12.7%. In 1944, by contrast, the towboats, approximately 10.2%, and the barges, approximately 17.5%.

Mississippi Valley's terminal facilities at New Orleans have been located, for the past 15 years, on the Industrial Canal at the Galvez Street wharf, where it occupies dock space, four hundred feet in width, allocated to it by the Dock Board, on a preferential basis, but this does not mean that its occupancy is exclusive since the Board may assign, in emergencies, part of such space to others as has been done on occasions when occupied areas were available for such assignment. The company maintains its dock office there, in its own structure, and the necessary tractors, trailers, derricks and cranes for loading and unloading of cargo; and maintains, also, a "business solicitation" office in downtown New Orleans; seven or eight persons being employed at the dock office, and four at the other.

[fol. 241] In St. Louis, Mississippi Valley conducts its home, or main, office which is staffed by fifty persons. Both there and at New Orleans, the company has other employees—dock laborers, hired by the hour to load and unload cargo, although a few are employed by the month at fixed salaries. The stevedoring operations at St. Louis, Cincinnati and New Orleans are substantially similar in size and character, although more dock laborers are employed at New Orleans.

(4) Union owns nine towboats and one hundred and twenty-two barges, which it employs in its interstate commerce operations as a water carrier, duly authorized by the Interstate Commerce Commission to ply certain portions of the Mississippi River system, including the Allegheny, Monongahela, Kanawha and Ohio Rivers, and the Mississippi from St. Louis to the Gulf of Mexico, as well as the Intracoastal Canal, west of New Orleans to Houston and Corpus Christi, Texas. In 1914, in addition to the advantage which normally enures to it by reason of a standing agreement existent between it and other water carriers, for mutual interchange of towing, Union found it necessary to make use of two chartered towboats and many barges as such common carrier of water-borne freight.

No one or more towboats or barges are dedicated to use on any particular section of the inland water system traveled. The flow of traffic normally controls and directs assignment of towboat or barge to service. When a shipper, for example, requires a barge, a suitable one, depending upon the kind of cargo offered, is supplied and, after the loaded cargo has been towed to and delivered to the shipper's point of destination, the barge may be re-loaded there and either wends its way back or proceeds further on, in continued movement of cargo, or it may be towed as an [fol. 242] empty to any other port where there is need of it for loading other freight offerings.

Its traffic from Pennsylvania to Louisiana, the principal commodities towed are manufactured steel products, etc., while the outbound freight from Louisiana is, in the main, petroleum products.

All of Union's downstream tows into Louisiana break up at New Orleans, but such barges as carry cargo intended for Texas ports are at once shifted to the motive power of towboats operated by barge lines that ply the Intracoastal Canal.

The bulk of Union's downstream freight originates in the Pittsburgh district, but it picks up cargo as it delivers, at intervening points, and the tow that finally comes to a halt at New Orleans may contain no barge that was once comprised in an original tow made up at Pittsburgh, but only such as were picked up in the tow's progress downstream, by way of replacing those consigned to intervening river points.

The ratio of Union's northbound traffic out of Louisiana to its southbound, is as of 3 to 1, the greater part of the out-bound cargoes originating not out of New Orleans, but out of Baton Rouge. The time consumed in making a turn-around trip from Pittsburgh to New Orleans is from thirty-five to forty days. A towboat, of necessity, usually stays longer in Pittsburgh than any barge, between trips, for the reason that running repair and maintenance work is done in that part and due consideration must be given to the time-off-requirements of the crew.

Union operates neither terminal nor office at New Orleans, but has a working arrangement with other barge [fol. 243] lines operating in and out of the port by which it assures the movement of its barges, and their tying-up whenever found necessary. It maintains no employees within the State of Louisiana, except that it does avail itself, for a money consideration, of the services of a shipping agent and importer, on occasion, in the manner and to the extent by it specially directed.

Arriving at Union's southern terminus, an inbound shipment of cargo is delivered in carrying barge to such New Orleans wharf as has been specified by the shipper, where barge and cargo are left at the responsibility of the consignee to be by him unloaded at his or the shipper's expense. When discharge of cargo is effected, the consignee notifies Union, which then seeks to effect prompt removal from the dock.

No towboats or barges are permitted to ever remain in port any longer than is necessary, Union's constant endeavor being to maintain the equipment at the maximum cargo ton mile performance, since it is uneconomical to have its barges lying idle, be it in Louisiana port or any other.

No loaded barge transferred to Union's motive power at New Orleans for northward towing, by any barge line operating out of Texas through the Intracoastal Canal, stays in port any longer than necessary to effect transfer, and, so soon as it is incorporated in a Union tow, it moves up the Mississippi.

All repairs are usually done at Pittsburgh. In New Orleans, Union maintains neither yard nor other repair facilities and equipment. Whenever emergency repairs are needed on either towboat or barges, the same is effected at the nearest available plant.

[fols. 244-251] Of Union's nine towboats, two did not enter Louisiana in 1944, and three of the seven that did, i. e., the Sam Craig, C. W. Talbot, and J. D. Ayres, each came in but twice, for aggregate stays in the port of New Orleans of 70½, 62 and 57½ hours, respectively, and in other Louisiana ports, of 73, 11 and 7½ hours, respectively, in the order named. A fourth, i. e., the Neville, entered three times, for aggregate stays in New Orleans of 99½ hours and in other Louisiana ports of 66 hours. The remaining three, i. e., the Peaco, William Penn, and Jason, each came into the State seven times, for aggregate stays in the port of New Orleans of 203, 195, and 137 hours, respectively, and in other Louisiana ports, of 52, 242½ and 517½ hours, respectively, in the order named.

Thirty-eight of the cargo-carrying barges and one fuel flat owned and operated by Union, did not find their way into Louisiana during 1944.

Of the total 8784 hours of 1944, 97.8% were spent by Union's towboats outside of Louisiana ports, 95.7% were similarly spent by its cargo barges, and 98% by its fuel flats, which last are used for carrying along the towboats required fuel on a long-distance trip, if, as a matter of fact, a particular vessel is not provided with sufficient storage space aboard.

Union's home office is at Pittsburgh, and all of its officers are residents of Pennsylvania, within what is referred to as the Pittsburgh district.

* * * * *

[fol. 252] As has already been observed, neither DeBardeleben, American, Mississippi Valley, nor Union, is a Louisiana corporation, Delaware being the State that gave the first three "the power to be as well as the power to function," while Pennsylvania stands in like relation to Union.

No part of the taxed watercraft and marine equipment of the three was within Delaware, corporate domicile of each, at any time; but Union's like movable property was located in Pennsylvania, from and to which state it was continuously operated in interstate commerce during the years 1944 and 1945.

In none of the cases under consideration can either the State of Louisiana or the City of New Orleans successfully maintain the claimed right to tax any of the movable property in question unless it be established by the evidence

that such property has acquired an actual situs for taxation within the State's jurisdictional limits notwithstanding a previously existent situs originally established by law at the domicile of the property-owner.

Ayer & Lord Tie Co. vs. Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. ed. 1082, (1906);

[fol. 253] Southern Pacific Co. vs. Kentucky, 222 U. S. 63, 32 S. Ct. 13, L. ed. 96 (1911);

See also: 51 Am. Jur. (1944), SS. 453, pp. 468, 649; ss 461, 462, p. 474; ss 803, 807, pp. 721, 725, ss 912, 913, pp. 807-809.

That neither the corporate domicile States of Delaware nor Pennsylvania choose to tax the respective plaintiffs' watercraft, adds nothing to defendants' claimed right of taxation. So far as the State of Louisiana and the City of New Orleans are concerned, it is of no legal moment whatever that all of said property forever remains totally untaxed, unless and until they do satisfactorily establish their right to, themselves, tax the said property.

Since, as has been repeatedly held by the United States Supreme Court, the State of its original remains the permanent situs of a corporation's movables, no matter whether they successively move across the State's boundaries for varying periods of time, provided they ever return to the State and never become permanently joined to an-intermingled with movables having a tax situs in another state, it is clear that none of Union's tugboats and barges did ever acquire a taxation situs in Louisiana. They were never *peramently* situated therein, as "permanently" is defined in the late case of Northwest Air Lines, Inc. vs. State of Minnesota, 322 U. S. 292, 295, 64 S. Ct. 950, SS L. ed. 1283, 1286 (1944); rehearing denied, 323 U. S. 809, 65 S. Ct. 26, 89 L. ed. 645. See also: New York, ex rel New York C. & H. R. R. Co. vs. Miller, 202 U. S. 594, 597, 26 S. Ct. 714, 50 L. Ed. 1155, 1160 (1906); and Johnson Oil Refining Company vs. Oklahoma, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238 (1933), and cases therein cited.

[fol. 254] While the watercraft of both American and Mississippi Valley were never within the boundaries of Delaware, that State was, nevertheless, legally instituted the situs of such movable property by virtue of the plaintiffs' respective incorporation under authority of its laws; and neither the State of Louisiana nor the City of New Orleans may tax any of said property without first show-

ing that, as to the particular property sought to be taxed, there has actually taken place substitution of a Louisiana tax situs for that of Delaware. Under the hereinabove detailed circumstances attending the interstate commerce operations of both of said named plaintiffs, it cannot be truly said that the presence of either plaintiff's watercraft within Louisiana was at any time of that "permanent" character necessary to fix and establish a new situs for the imposition of taxes therein.

As the Supreme Court of the United States observed with reference to certain ships operating between New York and San Francisco, and between the latter port and others, within the then Oregon Territory, in the case of *Hays vs. Pacific Mail Steamship Company*, 17 How. 596, 15 L. Ed. 254, decided in 1855, so, too, did none of the "taxed" movable property of either Union, American, or Mississippi Valley, ever enter the State of Louisiana, or come within any port thereof, except to discharge and take on cargo.

"independently of any control over them, except as it respects municipal and sanitary regulations of the local authorities, such as are not inconsistent with the Constitution and laws of the general governments; to which belongs the regulation of commerce with foreign nations and between States." (P. 599.)

In said *Hays Case*, it was established that the ships regularly visited, after discharging mail, passengers and [fol. 255] freight at San Francisco in approximately one day, a naval dock and shipyard owned and operated by the defendant shipping company, for furnishing and repairing its steamers, at the Port of Benicia, California; and that each ship there remained until the commencement of its next voyage, or, usually, ten to twelve days.

But the Supreme Court, nevertheless, held that the State of California had no jurisdiction over the vessels for the purpose of taxation, since none were "properly abiding within its limits, so as to become incorporated with the other personal property of the State", inasmuch as temporary presence in any California port in the character of water carriers engaged in commerce, wholly excluded the idea that they came to the State for the purpose of permanently abiding therein, which would have created a California taxation situs.

This Hays Case has been cited approvingly by the Supreme Court ever since 1855, to the point that a vessel engaged in interstate commerce is, primarily, not subject to taxation in other state than the one of its owner's domicile, when it only incidentally and temporarily touches at out-of-state ports for the purpose of delivering or receiving freight, because the vessel is not, in any proper sense, *abiding* within that state.

See: *Morgan vs. Parham*, 18 Wall. 471 (83 U. S.), 21 L. ed. 303 (1873);

Southern Pacific Company vs. Kentucky, 222 U. S. 63, 32 S. C. 13, 15, 17, 56 L. ed. 96 (1911);

See also: *Pullman's Palace-Car Co. vs. Pennsylvania*, 141 U. S. 18, 11, S. Ct. 876, 878, 35 L. ed. 613 (1891).

[fol. 256] In the *Morgan* case, *supra*, which basically involved the attempted assessment as personal property in the City of Mobile, Alabama, of certain vessels, including the steamer *Frances*, property of one *Morgan*, citizen of New York, from which state said vessel, having been first duly registered at the port of New York under *Morgan's* ownership, was brought down to Mobile in 1865. The *Frances* immediately engaged in the coasting trade between Mobile and New Orleans, from that time until the trial in 1870, and was enrolled at the customhouse in Mobile by her master as a coasting vessel in 1867, her yearly license as such being thereafter renewed in 1868 and 1869. The vessel, with others, constituted a daily line of steamers plying between the two named ports and the *Frances* touched at Mobile, and at New Orleans, no less than three times a week. Her captain was a resident of Mobile; and also a resident of the City was the vessel's business agent, conducting her affairs within the port. He occupied an office and he employed and paid the persons who there assisted him in the service of the line. However, he, himself, was under control of a superior agent residing in New Orleans, by whom both captain and crew were paid. In Mobile, furthermore, a wharf was maintained and occupied in the conduct of the vessel's operations in such coastwide traffic.

Upon these main facts devolved the question, said the Supreme Court, whether the *Frances* was subject to taxation as personal property, under the laws of Alabama.

The Federal Court below has rendered judgment upholding the assessment, and subsequent seizure of the *Frances*

for the non-payment of the tax levied, and it was insisted by the defendant in error, Parham, before the Supreme Court, that the vessel was personal property resting within the State of Alabama, and, therefore, property taxable as such. On the other hand, plaintiff in error, Morgan, con-[fol. 257] tended that the vessel was owned in New York, had never become blended with the commerce and business of Alabama, and being so operated in the interstate coasting trade, her taxation in Alabama violated the Constitutional grant to Congress of the exclusive power to regulate commerce among the States. (Art. 1, Sec. 8, Cl. 3.)

The Supreme Court, quite naturally, observed that the Frances, although a vehicle of commerce, was not ipso facto exempt from Taxation but, nevertheless, held.

“It is the opinion of the Court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only; and that it was engaged in lawful commerce between the states with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value. The case of *Hays vs. Steamship Co.*, 17 How., 596, 15 L. ed. 254, is decisive of the case before us. . . .”

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“Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That state alone had dominion over her for that purpose. . . .”

“The jurisdiction of this Court over the present case, as in the case of *Hays vs. Steamship Co.*, supra, arises from the facts: first, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and second, that the vessel was lawfully engaged in the interstate trade, [fol. 258] over the public waters. It is in law as if the vessel had never before or after that day been within the Port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the

authorities it is an interference with the commerce of the country was not permitted to the states.

"The judgment must be reversed."

The Louisiana taxing authorities here urge that the law of Louisiana requires that

"the rolling-stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose lines lies partly within this state and partly within another state, or states, or whose sleeping cars run over any line lying partly within this state or partly within another state or states, shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire lines." (6 Dart's Gen. Stat. ss 8370; Sec. 29 of Act 170 of 1898, as amended by Act 152 of 1932.)

and that in view of the factual situation reflected by the record herein concerning the operation of each one of the four "Lines" of transportation, other than railroad, telegraph, canal, and sleeping-car companies, the movable property of each such "other transportation company" is properly subject to taxation in Louisiana, within the schemes of "ratio assessment" prescribed.

Great reliance is placed by the defendants upon the case of Pullman's Palace-Car Company vs. Pennsylvania, 141 U. S. 18, 11 S. Ct. 35 L. ed. 613, but, conceding for the present purpose that each one of the four plaintiffs [fol. 259] and their respective transportation systems can fairly be brought within the intendment of the legislative expression when the lawmaker speaks of "other transportation companies", in connection with the railroad company, a telegraph company, a sleeping-car company, a canal company, and their "lines", it is interesting to note that the Supreme Court's decision was plainly based upon this finding of fact, viz.:

"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and from upon certain routes of travel. If they had never

passed beyond the limits of Pennsylvania, it would not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact, that instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has, at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on [fol. 260] business in Pennsylvania, and had about 100 cars within the state.

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States."

After reviewing and commenting upon several of such previous rulings, the Supreme Court observed that even more in point than any of the other cases which it had just mentioned, was the case of *Marye vs. Baltimore and*

Ohio Railroad Co., 127 U. S. 117, 8 S. Ct. 1037; which case was decided in 1888, and affirmed the judgment of the lower Federal Court that had enjoined the attempted collection by Virginia taxing authorities of taxes levied against the railroad company, a Maryland corporation, whose rolling-stock was specially exempted from taxation by the charter provisions. No part of the railroad company's roadway lay in Virginia, but it nevertheless operated its railroad with its own engines and cars within that state, under contracts of lease, on and over established [fol. 261] roadbeds and tracks of several Virginia corporations, none of which owned *buy* rolling stock.

These Virginia corporations, four in number, duly paid taxes assessed upon and against their respective roadways, trucks, depots, and other real estate owned by them, but, of course, were not assessed for the railroad rolling-stock owned by the Baltimore and Ohio Railroad Company and continuously operated by it on and over the track systems and operating appurtenances laid on Virginia soil, under the following conditions, detailed at greater length in the Supreme Court decision, viz:—no such rolling stock was assigned permanently to the four lessee Virginia lines mentioned, or either of them; the trains, composed of the B. & O. equipment, or rolling stock, ran from Lexington, Virginia, over said four lines into West Virginia, and thence into Maryland, to Baltimore, or, if any cars were destined for points west, thence from Harper's Ferry in that direction. None of such rolling stock was assigned permanently to service in Virginia, but was used interchangeable upon the main line and branches of the B. & O. railroad system, so-operated in Maryland and Virginia, and also upon the divisions of said Baltimore and Ohio Railroad in Pennsylvania and in States west of the Ohio River, just as varying necessities made demand upon the service rendered by the railroad company.

The Virginia statute under which it was sought to collect taxes assessed upon the constant quantity of B. & O. rolling-stock, so continuously within Virginia although ever changing in particular component parts, prescribed that every railroad and canal company "not exempted from taxation by virtue of its charter" should annually report its property to the therein designated State's officer for assessment and taxation, classifying the same under the following

[fol. 262] heads:—roadway and track, or canal bed, depôts, depot grounds and lots, station buildings and fixtures, and machine shops, all other real estate, rolling stock, of all kinds, boats, machinery, and equipments, houses and appurtenances occupied by lockgate keepers and other employees, stores, telegraph lines, and, finally, miscellaneous property. And it was, furthermore, specially directed that every such railroad and canal company should additionally report annually to said official the gross and net receipts of the road or canal, and if such road or canal lay only partly within Virginia, then such part had to be shown in relating to the entire length of road or canal, with the reported receipts duly apportioned.

The statute in question, which, admittedly, was the only Virginia legislation, if any, justifying the assessment of the B. & O. rolling-stock, especially provided that, upon the failure of any railroad or canal company to make the required reports, the same was to be immediately assessed, its real estate and rolling-stock rated \$20,000 per mile, and a tax levied on such value at the current annual rate of taxation in force; and that upon the tax levied remaining unpaid, the assessed property should be seized and sold.

The single question before the Supreme Court, as it observed, was whether the Baltimore and Ohio Railroad Company, under the circumstances detailed, was liable to taxation by the state of Virginia, with respect to the aforementioned rolling-stock that its owner had not reported for assessment.

The Court found that the statutory language referred to only such railroad and canal companies as derived their authority from the State of Virginia, and whose taxable property lay within the State; and confirmed the [fol. 263] existent injunction prohibiting the attempted collection of the taxes assessed upon and against the B. & O. rolling-stock.

But the Supreme Court took occasion to say that which suggested the observation that it made three years later, in deciding the Pullman Palace-Car Co. Case, in 1891, viz:

"It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over

the subject. It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the laws of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered, in particular instances, with reference to its operation as a regulation of commerce among the states; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case.

...
In both the *Marye Case* (1888) and the *Pullman's Palace-Car Co. Case* (1891), *supra*, as well as in the later cases of *American Refrigerator Transit Co. vs. Hall*, 174 U. S. 70, 19 S. Ct. 599, 43 L. ed. 899 (1899), *Union Refrigerator Transit Co. vs. Lynch*, 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708 (1900); *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905), *Union Tank Line Co. vs. Wright*, 249 U. S. 275, 39 S. Ct. 276, 63 L. ed. 602 (1919),^a and *Johnson Oil Ref. Co. vs. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238, (1933), the United States Supreme Court has uniformly held that where a corporation brings into a state other than the one granting

it the corporate charter, a portion of its movable property to therein employ and use the same in the conduct of its business operations for profit, carried on as one entity, in more than one state, such permanently established portion may be constitutionally taxed in said second state, by resorting to the generally adopted and approved method of first valuing as a unit the entirety of the taxable corporate property employed in the interstate operations, taking into consideration the uses to which it is put and all elements making up its aggregate value, and then ascertaining what proportion of the corpus may be fairly taxed as being within the bounds of the State in interest, without violating any Federal restriction.

[fols. 265-270] But never has any such assessment and taxation been approved by the Courts until and unless the state other than the one of corporate domicile, first satisfactorily established that within its borders, for the whole of the taxable year, the particular portion of the property sought to be taxed was regularly and habitually used and employed,—that there actually existed within the state, the taxation situs of such portion of said property.

No such situs, however, existed in the State of Louisiana during the taxable years at issue, as respects any of the "taxed" watercraft of American, Mississippi Valley, and Union, and each is apparently entitled to the refund of the "taxes" that were paid under protest.

[fol. 271] In view of all of the foregoing, and by way of formal recapitulation, the Court now makes the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. The water craft of American Barge Line Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation, respectively, never abided in the State of Louisiana nor did any of said watercraft, while moving in constant interstate commerce-traffic and intermittently coming into said State, ever remain therein for any more than such comparatively short periods of time as were required to discharge and take on cargo, or to make necessary emergency and temporary repairs to any unit of a tow.
2. The State of Louisiana was never the legally-constituted domicile of either of said three plaintiff corporations.

[fols. 272-273] 3. The corporate domicile of (a) the American Barge Line Company and the Mississippi Valley Barge Line Company, respectively, was in the State of Delaware, and (b), that of Union Barge Line Corporation, in Pennsylvania.

4. (a) None of the watercraft of said two Delaware corporations, respectively, were ever within the bounds of Delaware, but (b), the watercraft of Union Barge Line Corporation was within Pennsylvania and regularly operated therefrom in interstate commerce.

[fol. 274]

CONCLUSIONS OF LAW

1. Under Section 24 (1) of the Judicial Code, as amended (28 U. S. C. A. 41 (1)), this Court is vested with jurisdiction in all of the actions presented to it for adjudication (except the one of the Union Barge Line Corporation and the two of the DeBardeleben Coal Corporation, Nos. 1453, 1028, and 1470, respectively, hereinabove specially referred to and ordered dismissed for want of jurisdiction) in as much as in each of said remaining actions, which are founded on diversity of citizenship, there also exists a federal question concerning the continued retention of the illegal taxes collected, and segregated awaiting the termination of the litigation with respect thereto, and, moreover, the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

2. No tax situs with respect to any of the watercraft of American Barge Line Company, Mississippi Valley Barge Line Company, and Union Barge Line Corporation, respectively, has existed in the State of Louisiana at any time, and none of said watercraft was ever legally taxable within the said state.

3. The taxes which were assessed upon and against any portion of either of said three plaintiff corporations' watercraft were all illegally assessed and collected.

4. Said American Barge Line Company and Mississippi Valley Barge Line Company are entitled to recover from both of the defendants, as said plaintiffs have prayed for, respectively, in their original complaints against the State Tax Collector for the City of New Orleans, and in their original and supplemental complaints against the Com-

missioner of Finance and ex-officio City Treasurer of the City of New Orleans, State of Louisiana, relating to the [fol. 275] taxes of the year 1944; and, also, in view of the parties' stipulation to that effect made and entered into, in open Court, at the trial on January 14, 1946, to likewise recover as prayed for in their respective complaints relating to similar taxes for 1945, by them likewise paid under protest.

5. Said Union Barge Line Corporation is entitled to recover only as it has prayed for against said mentioned Commissioner of Finance and ex-officio City Treasurer of the City of New Orleans, State of Louisiana, with reference to the taxes of 1945.

[fol. 276] 11. The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions.

Let a judgment, in consonance with the foregoing, be, therefore, entered in each of the above mentioned actions; and let proper record be made of the dismissal, for want of jurisdiction, of the three actions to which the foregoing formal findings of fact and conclusions do not relate.

New Orleans, Louisiana, September 5th, 1946.

(Signed) A. J. Caillouet, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Number and Title omitted]

ORDER CORRECTING OPINION—Filed September 13, 1946

The Clerk of Court is hereby authorized and directed to forthwith take the following action, with respect to the Court opinion, wherein are incorporated Findings of Fact [fols. 277-278] and Conclusions of Law, which was lately filed by the undersigned Judge, in the matter of the eight (8)

"barge line" Civil Actions Nos. 1029, 1030, 844, 1028, 845, 951, 1188, and 1453, on the docket of the Court, viz:

1. On page 9, make the first paragraph, at the top, hereafter read:

American never engages in Louisiana intrastate commerce operations, nor do Mississippi Valley and Union; but DeBardeleben does, although only in a minor way.

2. On page 29, line 14, change the word "therefore" to read "apparently."

3. Withdraw the final pages 33, 34, 35, 36, and 37, and substitute therefore the hereto-attached pages 33, 34, 35, 36 and 37.

4. Thereupon, the entry of judgment, etc., as directed in said opinion, shall follow without delay.

New Orleans, Louisiana, September 13th, 1946.

(Sgd.) A. J. Caillouet, United States District Judge.

[fol. 279] IN UNITED STATES DISTRICT COURT

[Title omitted]

Condensed Narrative Statement of All Testimony in Various Barge Line Tax Cases Consolidated for Trial—By Agreement of Counsel—Filed August 6, 1947

(Sgd.) Arthur A. Moreno, of Counsel for Plaintiffs-Appellees. W. C. Perrault (L.), B. I. Cahn (L.), Henry G. McCall (L.); Alden W. Muller (L.), (Sgd.) H. W. Lenfant, Of Counsel for Defendants-Appellants.

[fol. 280] John C. Calhoun testified he is Acting Superintendent of Transportation, American Barge Lines, which operates between Pittsburgh, Pennsylvania and New Orleans, and makes an occasional trip from St. Louis to New Orleans. The boats operate on the Mississippi and on the Ohio Rivers to the cities just named but the barges go up the tributaries, going up the Cumberland and the Tennessee Rivers, and on the Monongahela; then they go

up into the Coastal Canal, and sometimes operate on the Allegheny and on the Conemaugh Rivers. They also operate between Pittsburgh, Pennsylvania and Pahrissa, Arkansas. The barges generally carry steel products originating in the Pittsburgh territory, and go down the river to Louisville, Memphis, Houston and St. Louis. Upstream, they carry mostly petroleum products, alcohol and sugar. Barges go up to Pittsburgh, and up the Tennessee River to Nashville; some go up the Conemaugh River to Charleston; some to St. Louis; and some to Minneapolis.

No towboat is particularly allotted to traffic going to New Orleans. A tow will start from Pittsburgh and it may be handled by three different boats before it comes to New Orleans. When a boat starts out from St. Louis, it is not known what it is going to take to New Orleans. The barges are not allocated in particular to traffic in New Orleans, but they operate wherever tonnage is offered. They operate beyond New Orleans to Houston, Texas in connection with the River Terminal Corporation and the Coyle Lines. When a tow reaches New Orleans on a downstream voyage, the tow is taken to Whiteman's Landing at Algiers and the towboats deliver the tow. The towboats then pick up the northbound tow and the barges brought to New Orleans are distributed by the tugs in New Orleans. Whenever cargo freight is brought to the docks to be transferred, it is done by local tugs. The American Barge Line does not own any terminal in New Orleans and has no warehouses. The [fol. 281] barges are delivered to local docks by local tugs, and the barges are unloaded by the Mississippi Valley Barge Line. American Barge Line does not have any stevedoring services.

When a tow coming downstream reaches Whiteman's Landing, the barges are picked up by a tug that takes it to Houston. At Houston, cargo going north is mostly petroleum products destined to Pittsburgh; Louisville, Charleston, West Virginia; Memphis; St. Louis; Chicago; and some up to Minneapolis. The barges are not permitted to remain in New Orleans any longer than necessary to load, and a towboat is turned around and sent north as quickly as possible. As soon as the barge is loaded; it is taken to Whiteman's Landing and as soon as ready to go, it is picked up by a towboat and taken to the point of destination. The American Barge Line has terminals at Glassport, Pennsylvania; Louisville, Kentucky; and Memphis, Tennessee.

Emergency repairs are made wherever necessary, but regular repairs are made at Jeffersonville, Indiana, which is opposite Louisville. Here the largest office is located where probably thirty-five or forty people are employed. Very rarely, empty barges are taken up-stream, but sometimes to New Orleans to take on cargo, but not to lie in New Orleans.

In 1943, the barges were moving up and downstream constantly, as there was much traffic at that time, and the boats and barges were kept moving as fast as possible. In that year, the "Jefferson" was in Louisiana 33 days, 7 hours and 45 minutes; the "National" 9 days, 3 hours and 15 minutes; and "Patriot" 11 days, 10 hours and 15 minutes.

Patrick Calhoun, President, lives in Louisville; Andrew Calhoun, Vice-President lives in Pittsburgh; Mr. Bayless, Secretary and Treasurer lives in Cincinnati; and the witness lives in Louisville. The annual meeting of the Board of Directors is held in Wilmington, Delaware, and the other [fol. 282] meetings of the Board of Directors are held in New York.

On cross examination, the witness testified that the boats were turned around in Louisville, Kentucky as fast as in New Orleans, as an attempt is made to turn them as fast as possible in every port. It is to the economic advantage of the owners to keep boats moving as fast as possible and to stay in Louisiana only as long as it is necessary to pick up, to bring down a tow, discharge it, pick up another tow, and take on supplies. Once in a while, they have to wait for a barge coming across the Coastal Canal.

He testified:

That their boats operate regularly from Pittsburgh to New Orleans, and occasionally from St. Louis to New Orleans; that their barges operate beyond New Orleans in connection with the River Terminal Corporation and the "Coyle" Lines (DeBardeleben Coal Corporation); that their barges going into the Intracoastal Canal as distributed by the "Coyle" tugs; that the Mississippi Valley Barge Line unloads the American's barges consigned to New Orleans. He states that the American Barge Line works a small crew of men off and on in New Orleans who sometimes clean out their barges.

Mr. Calhoun further testified that they maintain an office in the Maison Blanche Building in New Orleans employing

five people; that in the year 1943 their barges were used constantly.

Under cross examination Mr. Calhoun admitted that none of their boats or barges ever entered the State of Delaware; that their boats are turned around as fast as they can turn [fol. 283] them in every port; that they cannot afford to hang around ports. He testified that their boats take on supplies in New Orleans, and that their boats sometimes wait in New Orleans for barges coming across the Intracoastal Canal. He testified that they had forty-seven tows to New Orleans for 1943 and seventy-three tows to New Orleans in 1944; that they were in and out of New Orleans about once a week, and in the year 1944 they averaged better than that; that New Orleans is the terminus of their lines.

He testified that their tow boats and barges stop in New Orleans, and after the necessities of delay of days to make up the tow going northward, they then proceed up the river, and he admitted that in 1943 and 1944 the bulk of their tonnage originated in New Orleans and vicinity; that is, Intracoastal Canal, Chalmette, Port Sulphur, Baton Rouge, Lake Providence, La., Lake Charles, Louisiana all brought across the Canal and consolidated in New Orleans for northward tow.

He stated as far as tonnage is concerned, New Orleans was the biggest port of call on their line. That they maintain their own office in New Orleans yearly; that no tow boats or barges are allotted to any particular port, not even Louisville, Kentucky; that they use the wharves of the Dock Board of Louisiana for their barges.

He admits that the City of New Orleans and State of Louisiana offers, necessary fire, police and health protection; that the port of New Orleans had two fire tugs, which was different from other ports, and these tugs actually rendered fire assistance in 1943 to extinguish a fire on their tow boat "Pioneer".

Mr. Calhoun further testified that they used chartered boats in addition to their own equipment to come to New [fol. 284] Orleans during these years. Their exhibits only show movement of their own equipment. He admits that the State of Louisiana or the City of New Orleans is not seeking to tax them on their chartered equipment, but only on their out-right owned equipment.

Mr. J. Sterling Davis, Treasurer and Assistant Secretary,

and a director of the company, testified substantially the same.

He further testified that New Orleans is the southern terminus of their line; that they carry some cargo down the Mississippi to some points around New Orleans, to Port Sulphur, Louisiana. He stated that the American Barge Line Company owned approximately 200 barges in 1943 and 10 tow boats; that they own their own office furniture and fixtures and automobile in New Orleans. He admits some emergency repairs were made to their boats in New Orleans; that New Orleans is the largest transfer point on their line, and southern terminus of their line; that none of their boats have ever gone to Delaware, and that they pay *on* taxes in Delaware on their watercraft, nor any taxes on the watercraft to any other State; that their tow boats are too big to go into the Intracoastal Canal; that they endeavor to move their boats as fast as possible in every port no matter where. He stated that their Exhibit 5 excluded loadings on Intracoastal Canal points when showing the New Orleans figures as to tonnage. He stated that in addition to the port of New Orleans, they loaded barges at other ports in Louisiana; that they have no records to show the comparison of time spent in New Orleans compared with time spent in individual ports in other States, and they cannot tell whether their boats spent more time in New Orleans than in other ports during these years.

[fol. 285-301] Mr. Davis testified that they only carry on such corporate business in Delaware as required by the Delaware law; that the main corporate business of the corporation was transacted through meetings in New York; that as far as he knows none of their stockholders, directors or officers live in the State of Delaware, and that the Corporation Trust Company is their agent for service of process in Delaware; that their Exhibit 1 shows that their tow boat "Pioneer" was in New Orleans during one period for twenty-four days thirteen hours and forty-five minutes caused by a fire on their boat, which was repaired in New Orleans. He presumes that Louisiana and New Orleans rendered fire, police and health protection to their boats while in New Orleans and other Louisiana ports.

[fol. 302] G. C. Taylor, Vice President, Mississippi Valley Barge Line, residing in St. Louis, where is located the principal office of the company, testified he is in charge of opera-

tions. These operations are the transportation of freight in interstate commerce on the Mississippi River between Pittsburgh on the East, and for the whole length of the Ohio River and on the Mississippi River between St. Louis and New Orleans. Their regular service is maintained in those areas, and irregularly the Upper Mississippi River and some of its tributaries, as far as Minneapolis, is served by the Line. The terminals are located at Cincinnati, St. Louis, Cairo, Memphis and New Orleans, where the company has its own operations, but public terminals are used at Helena, Vicksburg, Baton Rouge, Evansville, Louisville and Pittsburgh. It operates as a public carrier on a certificate of the Interstate Commerce Commission. It owns the Towboats "Tennessee", "Ohio", "Indiana" and "Louisiana", which are registered in St. Louis. It also owns 85 to 100 barges. No towboat is especially allocated to any particular service, but they are sent to whatever port requires them, and they are not permitted to remain in any particular port any length of time, but every effort is made to keep them moving the greatest possible number of days a year, because they earn nothing when tied to the bank. When a towboat brings a tow, the tow is tied off—the towboat ordinarily takes fuel [fol. 303] and immediately proceeds to pick up its outbound tow and get out of town. A towboat may in some cases be delayed waiting for cargo or something of that sort, but the one object, after getting to a terminal point, such as New Orleans, is to get out again. Scheduled and regular repairs are made at Cincinnati, but running or emergency repairs are made wherever necessary, and occasionally there may be some delay to a towboat in New Orleans for that purpose. The towboats ordinarily remain from 12 to 15 hours, which is required to turn a boat around if everything works exactly right. The average is a little over that, perhaps 24, but it is in New Orleans solely for the purpose of bringing in an in-bound tow and taking out an out-bound tow. An attempt is made to have the out-bound tow ready and as soon as the in-bound tow is discharged it is immediately taken out of the Port of New Orleans. Towboats are assigned depending on circumstances, which change almost daily, by different cargo offerings, so that one boat may not be here for some time and another boat may repeat. The barges, like the towboats, are repaired at Cincinnati and only emergency repairs are made at other points. No

particular barge is assigned to the traffic between New Orleans and other points, but are assigned as cargo is offered. The barges are assigned in much the same way that a railroad would assign freight cars. Just as the railroad grabs the first car of the type required which is available, so the barges are grabbed, depending upon the type of barge required which is nearest to the point where the cargo is offered.

A barge starting out of Pittsburgh, for instance, will have in it barges for points other than New Orleans and will drop off barges and pick up barges as it comes down, and in a normal course of events the two will probably be handled by two or three different boats. The boats working [fol. 304] that tow will depend on how many pickups and drop-off's and what size it finally winds up being. The barges, when they reach New Orleans, are immediately reloaded for the north bound trip, but if cargo be light, they are sent back empty.

A certain number of barges go beyond New Orleans to Texas points by connecting lines. The towboats do not go beyond New Orleans but the barges are interchanged to a connecting line operating on the Intracoastal Canal. Those barges delivered to connecting lines are not permitted to remain in New Orleans any longer than necessary for the purpose of transportation to Texas. The barges are unloaded and reloaded and taken north by the next boat arriving here and are not permitted to remain in New Orleans for any purpose other than repairs, or unloading, or reloading. If empty barges are laid up they are not laid up in the port of New Orleans, but are taken to some other point for the obvious reason that remaining here would accumulate wharfage charges, and wherever a barge or any piece of equipment has to be tied up, it is tied up at Cincinnati, probably empty barges are moved out of New Orleans frequently. The company does not do any intra-state business, but the cargoes carried are entirely interstate.

The witness was shown an exhibit with all of the barges and towboats owned by the Mississippi Valley and said that the Towboat Indiana was not in Louisiana at any time in January and February, nor at any time in September, October and December of 1943.

The Towboat Louisiana was not in Louisiana any time in February, 1943, nor in June 1943, nor was it in Louisiana in December 1943.

The Towboat Ohio was not in Louisiana in May 1943, and in November 1943.

The Towboat Tennessee was not in Louisiana in January, in April, and September 1943.

[fol. 305] It was admitted that the Mississippi Valley Barge Line Company does not pay taxes on its tugs and barges to the State of Delaware; does not pay any taxes on the tugboats and barges in the State of Missouri, nor to any other state.

The President, the Executive Vice President and the Secretary-Treasurer all live in St. Louis, but one Vice-President lives in Pittsburgh. The Board of Directors meet in St. Louis. There are about 1500 stockholders who reside generally in the Middle west and East, and the witness knows there is some stock owned in Louisiana and New Orleans but had no idea of the amount. The City of New Orleans is the largest port on the line, but Pittsburgh would come very close to it and may exceed it. The witness is inclined, however, to think that New Orleans is larger. The number of barges in and out of Pittsburgh would closely approximate New Orleans. The Mississippi Valley Barge Line has more employees in New Orleans than in Pittsburgh because in Pittsburgh the shippers and consignees handle their own freight, but the large percentage of freight in New Orleans is handled by Mississippi Valley.

The company operates a wharf on the Industrial Canal, but the wharf facilities of the company are greater at Cincinnati and Galveston. Their facilities are greater in New Orleans than in St. Louis. The tugboats are registered in St. Louis.

Some repairs are made in New Orleans predicated on economical reasons but the "only times that any extent of work is done at New Orleans is when a boat has to be dry docked for under-water work, because there are only a limited number of places on the River where boats of this size can be pulled out of the water for that work. St. Louis is one and Pittsburgh another, and where the boat happens to be when the necessity of that work arises is what dictates where it is done." When the tug boats are in or [fol. 306] near New Orleans the dry docks at the Port of New Orleans are used to do the work, because other points on the line don't have floating dry docks large enough to take the boats, except the ports heretofore mentioned. Out-

of-water work is generally done in New Orleans or Pittsburgh. The volume of cargo handled in New Orleans is greater than in any other port with the possible exception of Pittsburgh, but the boats are kept moving in order to realize as much profit as possible out of the operations, but when two boats were laid up in the preceding Fall they were laid up at Cincinnati. When boats are laid up they are laid up either at Cincinnati or Pittsburgh. Boats are gotten out of New Orleans as quickly as possible in order to avoid the dock charges—and it is tied up at some other place if it is going to be laid up for an indefinite period.

The boats dock at Baton Rouge and remain there long enough to tie off a barge or pick one up, which requires from one to three or four hours, but the barges are not permitted to remain in Baton Rouge any more than necessary to load and unload the cargo. The operations at and through Baton Rouge will be practically the same in 1944 as in 1943.

He further testified that the Mississippi Valley Barge Line Co. is a Delaware corporation; in New Orleans, the Mississippi Valley Barge Line Co. have their own terminal operation; that during the period in question they owned four tow boats and eighty-five to one hundred barges, the tow boats being the "Tennessee", "Ohio", "Indiana", and the "Louisiana"; that New Orleans is a terminal point; that it takes perhaps twenty-four hours to turn a boat around in New Orleans.

He further testified that occasionally running or emergency repairs are made in New Orleans; that most of their [fol. 307] barges are unloaded at the Galvez Street wharf at New Orleans; that their tow boats do not go beyond New Orleans.

He pointed out that some of their barges do not get unloaded in New Orleans in time for their next boat going north, and such barges lie in New Orleans for about a two week period, and a few barges sometimes longer.

That the employees of the Mississippi Valley Barge Line Co. in St. Louis total seventy-five, whereas, their employees in New Orleans total eighty-five to one hundred. He explained that there is so much cargo in New Orleans, because New Orleans is a terminal point and a port, and the only point on their lines through which import and export traffic moves, and is therefore larger than their other ports; that they sent much out-of-the-country freight to New Orleans.

He admits that no taxes are paid on their tugs and barges in Delaware or any other State, and that he knows that the Louisiana taxing formula involves mileage. He knows that Louisiana and New Orleans furnish fire, police protection and health service for their boats; that they hold their meetings in St. Louis because their officers live there or near there. He thinks New Orleans is the largest port on their line, or in any event, that New Orleans and Pittsburgh are the largest ports on their line; that they maintain a permanent office in New Orleans, a solicitation office being in the business section of New Orleans, and they own their own office building at the Galvez Street wharf for the loading and unloading of their barges; that they own permanent installations at the Galvez Street wharf in the form of tractors, trailers and derricks; that they have been for [fol. 308] fifteen years at the Industrial Canal at Galvez Street and their wharf facilities are greater in New Orleans than at St. Louis.

Mr. Taylor further testified that they secure the fuel for their tow boats in New Orleans from the Shell Oil Company and secure some of their fuel from the Carrollton Avenue dock at New Orleans of the Standard Oil Company, and some fuel from the Standard Oil Company at Baton Rouge.

He further states that in addition to their own tow boats and barges, that they chartered additional tug boats and barges during this period, that some repairs are made at New Orleans. He stated that under-water boat repairs can be done in New Orleans, and were done on their boats here when in this vicinity; that all dry-dock work was done in New Orleans or Pittsburgh generally; that New Orleans is one of their principal ports, and that the cargo handled in or about New Orleans was greater than any other place, with the possible exception of Pittsburgh; that their boats were turned around as fast as possible in every port in order to move their cargo as rapidly as possible; that they have four hundred feet frontage on the Industrial Canal in New Orleans, and that their operations for 1944 were substantially the same as in 1943; that they also deliver and take cargo at Baton Rouge, Louisiana, and under their interstate commerce certificate, they could take cargo from New Orleans to Baton Rouge.

P. B. Lansing, Superintendent of Terminals for the Mississippi Valley Barge Lines, testified substantially like the

testimony of Mr. Taylor and that none of their boats are allocated to any special port on the Mississippi River; that most of their under-water repairs are done in New Orleans; [fol. 309] that Pittsburgh and New Orleans are considerably ahead of St. Louis in tonnage; that they maintain about one hundred employees in New Orleans, which is more than they maintain in St. Louis; that they have permanent wharf facilities in New Orleans with their own building and equipment for servicing their barges.

Mr. William S. Hay, Dispatcher at St. Louis, of the Mississippi Valley Barge Line testified that a dispatcher continually makes every effort to expedite the movements of the boats and barges; that he determines how their boats and barges shall move; that the Mississippi Valley owned eighty barges during this period; that no particular barges are assigned to any particular movement; that the Mississippi Valley operates on the Mississippi River and other Rivers between Cincinnati, Ohio and New Orleans and St. Louis, Missouri and New Orleans; that among their intermediate stops is Baton Rouge, Louisiana; that their barges lie idly at New Orleans if there happens to be no use for them on their first up-bound boat, but most likely these barges would catch the next up-bound boat; that they try to get a quick turn-around at all ports to get the full utility of their barges; that the Mississippi Valley owned four towboats during the period in question, which operated between Cincinnati and New Orleans; that a round trip between Cincinnati and New Orleans approximated thirty-five days; that their tow-boats were in New Orleans from twelve to forty-eight hours on each trip, depending on whether emergency repairs were necessary.

Mr. Hay further testified that the Mississippi Valley maintains a repair shop in New Orleans to make those repairs which must be made to keep the equipment moving out of that port.

[fol. 310] He testified that they maintain a permanent office in New Orleans; that they have some buildings at the Galvez Street wharf at New Orleans; that during the year 1943 their tow-boats with a string of barges would arrive at New Orleans once a week or slightly oftener, and that this service was constant throughout the year; that they used whichever barges were most convenient to go to New Orleans; that their four owned-tow-boats ran in and out of

New Orleans in 1943 in addition to some chartered tow-boats and barges; that the Mississippi Valley owned outright and operated during 1943 four tow-boats and eighty barges; and operated additional chartered watercraft equipment during 1943 and that this chartered equipment also operated in and out of New Orleans to some extent, which was made necessary by the increased traffic at times; that the four tow-boats owned were the "Ohio," "Tennessee," "Indiana" and "Louisiana" and that these tow-boats did not go to St. Louis during 1943 with possibly one or two exceptions, but operated on a regular schedule between Cincinnati and New Orleans; that a chartered boat made the run from St. Louis to Cairo and made connections with their through schedules between Cincinnati and New Orleans.

"Q. But Mr. Hay would you say off hand that there were more of your equipment including tow-boats and barges in New Orleans during 1943 than there were in St. Louis.

"A. Yes, because it is a much bigger port."

That their four owned tow-boats came out of Cincinnati and picked up any barges from St. Louis at Cairo, Illinois; that during 1943 New Orleans alone would handle about one-half of the cargo, and all other intermediate points between New Orleans and their point of origin would about handle in the aggregate the other half; that they have permanent equipment at Galvez Street wharf at New Orleans, which they operate the year round; that their equipment comes into New Orleans and is unloaded at the Galvez Street wharf, some barges are then loaded there and some barges are distributed at points along the Mississippi River for loading in the New Orleans harbor; that their tow-boats do not tie up for any number of days at their Galvez Street wharf, except where major repairs are necessary, and these are usually done at Todd-Johnson Drydocks at New Orleans.

He testified that their reports show, for example, that Barge MV-49 (Exhibit Cave) (Hay 1) arrived in New Orleans on September 10th, 1943 and did not leave New Orleans until October 28th, 1943, and he testified that this seemed to have been a barge that either remained in New Orleans for lack of cargo for its use outbound, or it could have been placed somewhere on the River awaiting arrival of expected cargo, or it could have been awaiting its chance to be temporarily repaired before it could be used. When

asked if Mississippi Valley had any facilities in New Orleans to repair their barges, he testified that temporary repairs, unless of an unusual nature, could be made in New Orleans; that it also appears from their records (Cave Hay 2) that Mississippi Valley Barge BM 57 arrived in New Orleans November 17th, 1943 and remained in New Orleans through the balance of 1943 as no date is shown of leaving New Orleans in 1943; that their records (Cave Hay 3) also show a barge in New Orleans from July 31st, 1943 to September 13th, 1943; that their smaller barges, which number fifty out of their eighty, might lay over in New Orleans for a greater than average length of time due to the lack of need for the barge outbound, or to favor tow make-up; that Exhibit (Cave Hay 4) shows Barge MB 38 stayed in New Orleans from August 23rd to October 2nd, [fol. 312] 1943; that (Cave Hay 5) shows barge MB 46 stayed in New Orleans from February 21st, 1943 to March 30th, 1943; that Barge MB/30, which is one of their larger type of barges (Cave Hay 6) stayed in New Orleans from August 31st, 1943 to October 2nd, 1943, and that it is possible that there may have been a few other barges that missed the first boat out of New Orleans through lack of cargo or because it was necessary to temporarily repair the barge before it could be used; that they attempted to maintain as quick a turn-around with their equipment in St. Louis and Cincinnati and other points, as in New Orleans, in order to keep their equipment moving; that New Orleans is the terminus of their line, and when they reach New Orleans they turn around to go north after discharging cargo and picking up new cargo; that they have their own maintenance man in New Orleans who looks after any necessary temporary repairs; that none of their owned four towboats nor 80 barges ever went into Delaware during the year; that they operated exclusively on the Mississippi and Ohio Rivers; that their principal port in Louisiana is New Orleans and secondarily Baton Rouge; that all of their tows either originate in New Orleans or terminate in New Orleans, if they are in Louisiana; that if there is no cargo for an empty barge in New Orleans, and it was not needed at some other port, the barge would no doubt wait in New Orleans for cargo; that there is no port, over any other, where their barges are laid up indefinitely; that they have sometimes moved empty barges from New Orleans to Cin-

cinnati for cargo, or empty barges from Cincinnati to New Orleans for cargo.

Mr. Alfred S. Osbourne, in charge of operations testified that the Union Barge Line is incorporated under the laws of the State of Pennsylvania; that the Union is a common carrier by water operating over certain portions of the [fol. 313] Mississippi River System, and some connecting waterways; that they operate between New Orleans and Pittsburgh; that under their tariff, they have five days free time for unloading their barges in New Orleans; that they had a man in New Orleans, Gayle Aiken, to handle their business, who had a shipping business of his own, and that in 1944 they maintained this man on a salary basis; that their barges are handled indiscriminately throughout their whole course of operations depending on the kind of barge needed for loading particular cargo at various points, etc.; that all of their barges and tow boats are kept moving as quickly as possible at all ports; that most all of their traffic on the Intracoastal Canal is towed for them by other boats over to New Orleans, and the only waiting time at New Orleans was in making connections with one of their tow-boats; that their barges may wait in New Orleans from one to three days for their own boat to pick them up; that they pick up their barges in other Ports in Louisiana as soon as they have a tow-boat to do so.

Mr. Osbourne testified that they chartered other towboats and a great many barges in addition to their outright owned equipment, and that all of their chartered and owned equipment go indiscriminately to all of their ports of call; that they owned nine tow boats and about one hundred twenty-two barges during the period in question; that some of their tow-boats and barges made repeated trips to New Orleans in 1944, while some may not have gone to New Orleans at all during this period.

He further testified that the Union had a boat out of New Orleans about once a week during the year 1944; that their principal ports in Louisiana are New Orleans and Baton Rouge; that they normally run their boats to New Orleans only, and other towing Companies take their barges through [fol. 314] the Intracoastal Canal; in 1944, every trip ended in New Orleans with their boats and came back, but not so the barges; that no barge has a man on it; that the barge is delivered to a terminal specified by the consignee or the

shipper and then moved to another point in New Orleans for cargo to be transported northbound; that they had an arrangement with other Barge Line Companies operating in and out of New Orleans for the transfer of their barges or the tying up of their barges; that their barge shipments from the north originated principally in the Pittsburgh District and in certain instances on the way down they picked up cargo at Memphis for delivery at New Orleans and other points likewise in between; that in 1944, 75% of their tonnage was up-bound and 25% down-bound, and they very often had to take empty barges down to Louisiana to bring them back loaded; that their principal commodities that were taken into New Orleans for delivery to that port were manufactured steel products and the principal commodities out of New Orleans were petroleum products; that the substantial portion of the up-bound cargo originated in Baton Rouge; that in an emergency they did repair work to their watercraft in New Orleans; that he wouldn't know from his position in Pittsburgh, what fire, health or police protection was afforded their boats in Louisiana; that the five days free time allowed in New Orleans for unloading was arrived at through shipper experience, in loading a barge of 500, 600, or 700 tons would take about that much time. He presumes that the fire, police and health departments in New Orleans and the State of Louisiana are ready and available for service to their boats or crews when needed; that they attempt to fuel their boats in Baton Rouge, or if needed in New Orleans; that there is an average turn around of between thirty-five and forty days for a trip to New Orleans and back to Pittsburgh, and that he wouldn't know [fol. 315] whether any of their crews got any of their lay-off time in New Orleans during 1944.

He testified every cargo destined for New Orleans is delivered at a dock specified by the shipper and the cargo is unloaded by the consignee. The consignee under Interstate Commerce Commission Directive No. 100-B has five (5) days in which to unload the barge, but have unloaded sooner. It is removed by the Union Barge Line Corporation as soon as possible.

The Union Barge Line Corporation has no office in the City of New Orleans and has no terminal in the City of New Orleans. It had a man who attended to some of the business as directed by the Union Barge Line Corporation, but he did not attend to all of the details in connection with

the delivery of cargo and barges. He is Mr. Gayle Aiken, who has a shipping business of his own and has done some of the work of the Union Barge Line Corporation, incidental to his.

The Union Barge Line Corporation employs a shipper and a broker to handle its affairs in New Orleans, no particular barge or tow-boat is allocated to the New Orleans trade. Barges are not permitted to remain in New Orleans any longer than required for loading and unloading, as barges produce revenue in proportion as they move. A tow-boat is like a barge and an attempt is made to keep them moving as much of the time as possible. Emergency repairs are made at the closest point where the emergency occurs, but normally repairs are made in Pittsburgh. One of the tow-boats is not authorized by the same boat inspection service to go below Louisville.

Lawrence M. Baker, Auditor of Union Barge Line Corporation [fol. 316] testified the State of Pennsylvania does not tax this equipment, but the capital tax is paid to Pennsylvania since the corporation is a Pennsylvania corporation.

Alden N. Gee testified that four (4) barges UBL 117 to 120 did not spend any time in Louisiana during 1944. The barges UBL 122 and 123 did not spend any time in Louisiana in 1944. Likewise the barges UBL 125, UBL 129 and UBL 130 did not spend any time in Louisiana in 1944. Likewise UBL 137, UBL 138 and UBL 140. Likewise UBL 205, UBL 218, UBL 234, UBL 235, UBL 236, UBL 238, UBL 239, UBL 241, UBL 243, UBL 247, UBL 248, UBL 250, UBL 255, UBL 257, UBL 262, UBL 269, UBL 275, UBL 277, UBL 280, UBL 281, UBL 301 and UBL 302. The tow-boats Reliance and Dravo 42 did not spend any time in Louisiana in 1944. On cross examination he testified the Union Barge Line Corporation owned nine (9) tow-boats.

Lowell L. French testified substantially as the witness Osbourne.

Lawrence M. Baker, Auditor of the Union Barge Line testified that the Union pays no taxes to the State of Pennsylvania nor to any other State on their watercraft.

Alden W. Gee, Head of the Statistical Department of the Union Barge Line testified that the graphs and charts prepared by him of the movements of their tow-boats and barges only included their owned equipment and excluded [fol. 317] the watercraft they chartered; that no charts

were made of the chartered equipment; that some of their tow-boats made repeated trips into Louisiana during 1944 as well as some of their barges.

Mr. Cavanagh T. Bayard, Acting Chief of Harbor Police of the Port of New Orleans testified:

That he is employed by the Board of Port Commissioners of the Dock Board for the City of New Orleans; that the Dock Board employs sixty patrolmen and ten officers in patrolling along the wharves of the Mississippi River and the Industrial Canal in New Orleans to watch out for fires, smoking, stealing or similar situations; that it is the duty of these men to check on fires or disturbances on boats and barges moored in the City of New Orleans; that they maintain fire alarm systems all along the docks, and have a daily boat patrolling the water.

Mr. John A. McNiven, Chief Engineer of the Dock Board in New Orleans Testified:

That during the years 1943 and 1944, the Dock Board had two fire tugs, the "Sampson" and "Deluge" on duty twenty-four hours every day, maintaining steam at all times and manned by two shifts; that their purpose is to help save boats from sinking by use of siphons on fire tugs; that they were also used to extinguish fires, rescue drifting barges; that the "Sampson" maintained a crew of twenty men and the "Deluge" a crew of thirty men. He testified that the Dock Board gives ten days free time for wharfage after the first six days, and then the tariff begins over again; that their boat the "Deluge" is equipped to fight chemical and oil fires; that no charges are made to water-craft by the Dock Board for any fire service maintained or rendered by way of its fire boats.

[fol. 318] Mr. Frank P. Rivard, Chief Engineer of the New Orleans Fire Department Testified:

That the New Orleans Fire Department goes out to the wharves on the river to try to extinguish all fires on barges, boats and etc., that they answer alarms in from two to five minutes and their department is on call every day for twenty-four hours; that fire alarm boxes are maintained all along the wharves as well as service of the American Dist. Telegraph Company for reporting fires on the water front, for which no charge is made to vessels.

Captain F. J. Aragon, Captain of Police of the City of New Orleans Testified:

That the police of the City of New Orleans maintain a twenty-four hour police protection to the wharves, and boats moored on both east and west bank of the entire water front in the Parish of Orleans; that any robbery on any ship comes under their jurisdiction, and they maintain constant service to quell any disorders or crimes on any water craft for which police protection no charges are made to any vessels; that police protection extends to movable marine equipment such as ropes, anchors, engines, chains, etc., and it is within their jurisdiction to maintain discipline and order on all boats tied to the banks in the City of New Orleans; that the Police Department of the City of New Orleans have squad cars constantly available day and night which take in the entire water front on both sides of the river or any other water ways in the City of New Orleans; that it cost \$1,500,000.00 a year to maintain the New Orleans police department; that the Police Department has actually gone aboard boats and vessels in connection with any assault or crime or any other disorder where they may be needed, and with their squad cars and [fol. 319] radio they can get anywhere along the water front in from three to five minutes in the City of New Orleans.

Mr. E. B. McCarty connected with the Health Department of the City of New Orleans Testified:

That the City of New Orleans constantly maintained health service on the river front, particularly in a rat control program, which is rendered both to keep rats from coming off the ships onto the wharfs, or rats coming off the wharves to the ships moored along the side; that the City of New Orleans maintains this health service with no cost whatsoever to the watercraft along all the water front of the City of New Orleans; that they trap rats daily to examine them for typhus fever, bubonic plague, etc.

STIPULATION

It is stipulated between counsel of plaintiffs and defendants that while barges are moored in New Orleans and other ports in Louisiana no personnel is maintained by the Barge Line Companies on their barges.

ADMISSION

It is admitted in the record that none of the stockholders, officers, or directors of the American Barge Line Company, Mississippi Valley Barge Line Company or the DeBardeleben Coal Corporation reside in the State of Delaware, and that the Corporation Trust Company in Delaware is used by these corporations as agent for the service of process.

Mr. J. H. Cain, Chairman of the Louisiana Tax-Commission, testified he was Chairman of the Louisiana Tax Commission during 1943 and 1944, and took part in making an assessment of the floating equipment of the American [fol. 320] Barge Line, and arrived at the assessment "by calling on them for information and whatever other information that we could get." Called upon for the records, he said: "My records show that we listed the boats 'Pioneer', 'Patriot', 'National', 'Progress', and 'Jefferson', and more than two hundred barges at an estimated value of \$1,200,000.00." He arrived at the assessment by getting "information regarding other boats that were considered about equal in value to these in estimating the value". He did not get any information as to those particular tow-boats and barges and did not view them. He says the records fail to show a personal inspection of the property in question, but the record shows he talked to a Mr. Fee, the local agent, who gave him the names of these boats and admitted that they had over two hundred barges.

Mr. Cain never inspected any boat in Louisiana and cannot answer whether anyone connected with the Tax Commission made an actual inspection and appraisal of those particular boats, and the only record he has with reference to the assessment of these boats and barges is "Assessed, \$400,000.00", and that the correspondence with the company did not give him the value of any of the boats or barges, but "they refused to give us that information."

An examination of the correspondence with the American Barge Line failed to show that they gave any value to any of the boats, and the conversation with Mr. Fee merely advised him as to the number of tow-boats and the number of barges owned by the American Barge Line Company. He placed a value on tow-boats and barges without ever seeing the tow-boats and barges. He ar-

gived at the value placed upon the tow-boats and barges "by estimating it from information I had from other companies who did give us the value on like property" [fol. 321] and he adopted the value of the tow-boats and barges of the American Barge Line Company from values given by other lines.

He says he estimated the value of all tow-boats and barges of the American Barge Line at \$1,200,000.00 and took one-third of that value for assessment purposes in Louisiana. When asked how he arrived at the one-third which he took as a basis of assessment, he said: "Well, I don't know that I could hardly answer that question, except trying to be fair"; that "I didn't get too much value on theirs." When asked if he had some facts upon which he based his conclusion of fairness, he replied: "Well, since they would give us no information, I merely estimated that they were in the State, or did at least a third of their business in the State, and arrived at one-third." When asked how he estimated that one-third of their business was done in the State, he replied: "Purely an estimation". When asked upon what that estimation was based, he replied: "That's a pretty difficult question. I don't know that I could answer it, sir." When asked if it were not a fact that he had no basis for the selection of one-third, he replied: "Well, without information, I had to arrive at something. Knowing that they did own this property, admitted by Mr. Fee, and doing business in Louisiana, I felt that they should pay some taxes." He stated his theory was that if they did business in Louisiana that their property used in connection with that business was subject to ad valorem tax.

When shown Exhibit Number One, showing the Steamer Jefferson was in Louisiana only thirty-three days, seven hours and forty-five minutes, and asked how that effected his belief as to the correctness of his assumption that one-third of the time was the proper time upon which to base the assessment, there was an objection on the [fol. 322] ground that the amount of the assessment was not at issue which was sustained.

Mr. Cain stated that he did not know how long the Steamer Jefferson or the Steamer National were in the State of Louisiana, and did not know what time each one of these boats was out of the State of Louisiana. When asked if he had made the assessment upon a mileage basis, he replied;

"We made the assessment on what information we could get. You could call it a mileage basis, or whatever you choose. If they had given us the mileage basis which we asked for we might have put it on that basis. But in the absence of any information, we did the best we could, sir, in trying to be fair with these people, whom we considered owed taxes to Louisiana." When asked if his final statement was that he didn't have any facts upon which to make the assessment and, therefore, made it upon a basis which he considered fair, he answered: "I think we had some facts, sir, to base our assessment on, first, because we know—and I don't think it's denied—that they do operate in Louisiana; and further, the conversation that I had with Mr. Fee, who stated he was the agent of the company, admitted that he owned these boats and the barges." When asked if Mr. Fee told him if the barges and towboats had remained in Louisiana long enough to become incorporated in the general mass or property in Louisiana, he replied: "The record does not so state."

When asked if he knew how many times a year the "Pioneer", the "Jefferson", the "Patriot" and the "Progress" came into Louisiana, he answered that he did not know. When asked if he made the assessment upon a ratio basis of the use of those vessels in other states and in Louisiana, according to the mileage travelled in and out of Louisiana, he answered: "I assessed them on what information I could [fol. 323] gain, both from questioning and writing the company, and for other information we could gain." When again asked whether he had used the ratio of mileage for making the assessment, there was an objection that the method of assessment was admitted in the pleadings and was not at issue, which was sustained.

When asked if he knew the mileage covered by the towboats and barges outside of Louisiana, he answered he did not know, and did not know the mileage covered in Louisiana. When asked if, notwithstanding he did not know the mileage outside of Louisiana and the mileage in Louisiana, he had used a proportionate mileage basis for making the assessment, he answered: "It seems that is what we did." He did not know the exact distance on the Mississippi River from the state line to the City of New Orleans.

He testified the date for making the assessments of property in New Orleans was August 1, but he did not know whether the Steamer Jefferson was in Louisiana on August

1, and that is equally true with the other steamers, and although the assessments were to be made on August 1 he did not know whether these steamers were or were not in Louisiana. When asked if the assessment had to be made on the affirmative facts of the presence of these boats in Louisiana, he answered: "I don't think so, sir." When asked that without knowing whether the property was from some other state, he answered: "that I based the assessment on what information I could get and the conversation with your agent here."

He was asked if it were not a fact that Mr. Fee did not tell him what tow-boats or barges were in Louisiana on August 1, and which had been here prior to that time sufficiently long to acquire a status, he said: "I admitted that he did not give me that information but he did not say they were not here, and because he did not give that information I had to assume, sir, they were here and subject to taxation." When asked if his assessment rested upon the assumption they were here and not upon the fact of their presence, he answered: "I assessed them on the best information I could get." He did not know whether they were here, and said "I believe I have told you I did not know whether they were here or not."

On cross examination he testified that the company refused to give him information and because of that fact he made the assessment. When asked as to whether he discussed with Mr. Fee the operation of these tow-boats and barges, he answered: "I couldn't tell you about the conversation, other than that he did give me the names of these boats, and also told me that they had some two-hundred barges." When asked whether he had discussed with Mr. Fee the operation of this barge line in Louisiana during those years, he said, "Well, I am sure that I did discuss that with him, but I can't tell you what was discussed." He said he believed that the American Barge Line operated in and out of New Orleans with their tow-boats and barges during 1943 and 1944.

Mr. Cain was shown a return of Mississippi Valley Barge Line Company upon which appeared the words "and \$450,000.00" in his hand-writing. He said, "I could not tell you hardly, except to say it's an arbitrary value after trying to get the facts from the taxpayer." He could not say of his own knowledge how much of the equipment of the Mississippi Valley Barge Line Company was in Louisiana at

[fol. 325] the time the assessment was made. The assessing date outside of New Orleans was January 1st, inside New Orleans August 1st, and he did not know how much of the water equipment of Mississippi Valley Barge Line Company was in New Orleans in August 1943. When asked if he made the assessment on a mileage basis, he answered: "Well, I could not say we made our assessment on a mileage basis, we are trying to ascertain what property the Mississippi Valley Barge Line Company owned and then it appears from the record here that we estimated a value on all of their holdings and then made an arbitrary assessed value." When asked if he had not been advised by the taxpayer it would not report this property because it had no situs in Louisiana, he answered: "We have what is supposed to be a report from them, but rendered no water craft whatever, but we did ascertain that they owned considerable water craft and made an arbitrary assessment on the information that we received outside of the report that was made."

He said the assessment was made mostly on the information received from Mr. Mann and file does not show there is any basis for the assessment other than the report by Mr. Mann. He said he would not say the assessment of \$450,000.00 was on a mileage basis, but "I would have to answer that it is purely an arbitrary figure because we failed to get the information from the taxpayer."

On cross-examination, he said: "He learned that the taxpayer had four (4) tow-boats and the Commission put a valuation of \$50,000.00 each and also learned it had eighty (80) barges and placed the valuation of \$1,600,000.00 on the barges, or a total valuation of \$1,800,000.00. The \$450,000.00 assessed in Louisiana appears to be about 25% of [fol. 326] the total estimated value. The Commission figured that 25% instead of the whole 100% would be a fair value for the amount of property in Louisiana. The Louisiana Tax Commission left 75% of the total valuation for the taxes of other states. He was not able to say that the 25% was figured on a mileage basis or just for the time this water equipment was in Louisiana and said: "I am not in a position to say it was a mileage basis, it was only an arbitrary estimated value because we failed to get any further information."

On re-direct examination, he testified that he did not know the length of time each one of the tow-boats remained in

Louisiana and likewise did not know how many days the barges remained in Louisiana. He said, as a matter of fact, he could not testify that all eighty (80) of these barges had been in Louisiana during 1943, but took the valuation of 1,800,000.00 and attributed 25% value to the property in Louisiana.

When asked how he arrived at the 25% appropriation which was adopted, he said: "Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana."

"Question: Do you know any definite basis for the adoption for 25% any more than 50% or 10%?"

"Answer: No, sir."

Mr. Cain testified that the Louisiana Tax Commission arrived at the value of the boats and barges of the American Barge Line Company from information regarding other boats that they considered about equal in value to the [fol. 327] boats of the American Barge Line Company, and accordingly estimated the value of the boats of the American Barge Line Company; that the American Barge Line Company refused to give the value of their boats and barges to the Louisiana Tax Commission; that there are billions and billions of dollars worth of property in the State of Louisiana that he never sees and yet places a value on it; that the Tax Commission allotted one-third of the total assessment of the American Barge Line Company boats to Louisiana, such one-third amounting to \$400,000, because he knew that they owned this property, that they did business in Louisiana and that they should pay some taxes; that the Louisiana Tax Commission did the best they could under the circumstances in the absence of the American Barge Line Company giving the Commission the necessary information, and that the Louisiana Tax Commission tried to be fair with the American Barge Line Company in the assessment placed on their boats.

He was asked by counsel for the Barge Line:

"Question: Do you tax the water equipment of the United Fruit Company, which is a Delaware Corporation, because it operates into the port of New Orleans?"

Mr. Cain further testified that they used the proportionate mileage basis for the assessment. He further testified that it was the failure of the American Barge Line Company to accede to the request of the Louisiana Tax Commission and furnish certain information which made it impossible for the Louisiana Tax Commission to make an assessment other than the assessment that was actually made.

[fol. 328] Mr. Cain further testified that Mr. Fee, the agent of the American Barge Line Company, New Orleans, admitted that the American Barge Line Company operated in and out of New Orleans in the State of Louisiana with their tow boats and barges during the year 1943 and 1944; that he received the information as to the number of boats and barges of the American Barge Line Company that came into Louisiana from Mr. Lee, the New Orleans agent of the American Barge Line Co.

Mr. Cain testified that the duties of the Louisiana Tax Commission was to review the tax rolls as rendered by the assessors and to correct any errors that may be found. He stated that he seldom ever sees any property on which assessments are made; that the Commission generally makes the assessment from the reports rendered by the taxpayers themselves. He stated that the Mississippi Valley Barge Line would not render any water-craft on their tax report, but the Tax Commission ascertained that they owned considerable watercraft and made an arbitrary assessment on the information that the Commission received outside of the Mississippi Valley report, and that an arbitrary assessment was placed on their water-craft because of their failure to get the information from the Mississippi Valley Barge Line; that it was disclosed to the Tax Commission that the Mississippi Valley had four tow-boats and eighty barges they operated at various times during the year 1943 in Louisiana, and that the Tax Commission placed an estimated value of \$50,000 each on the tow boats of the Mississippi Valley Barge Line and an estimated value of \$20,000 each on the barges of the Mississippi Valley Barge Line, and from this total estimated value of \$1,800,000, the Louisiana Tax Commission placed an assessment for Louisiana against this water-craft equipment of \$450,000, which would be [fol. 329] about twenty-five per cent of the total estimated value; that the Commission only took twenty-five per cent of the total estimated value because it figured that this

would be a fair value for the amount of property in Louisiana; that one of the officials of the Mississippi Valley Barge Line Company in St. Louis had given them the information in a letter that this Company owned four tow-boats and eighty barges; that the Tax Commission left seventy-five per cent of this valuation for other States in which this Company operated to tax this water-craft, and that the assessment was an arbitrary estimated value because the Mississippi Valley Barge Line refused to give them the necessary information; that he has actually seen the boats of the Mississippi Valley Barge Line going up and down the Mississippi River, and that they had the name "Mississippi Valley Barge Line Company" on the side of their boats; that the Louisiana Tax Commission did not have the records nor access to the records of the Mississippi Valley Barge Line Company to show their actual equipment which stayed in New Orleans permanently or came here at periodic intervals; that the Tax Commission sent their reports to the office of the Mississippi Valley Barge Line Company to have them give the Tax Commission this information; that the Mississippi Valley Barge Line Company refused to give the information which is the reason for the arbitrary assessment.

Mr. Sidney J. Mann testified that during 1943 and 1944 he was a field inspector for the Louisiana Tax Commission and had never been employed on or about any watercraft operating on the Mississippi River or any other waterways prior to his employment by the Louisiana Tax Commission. He was a prohibition agent during the prohibition period. He was the field inspector who made the reports upon which [fol. 330] were based the assessments against the various plaintiffs. He testified that the various plaintiffs had refused to give him any information regarding their equipment, notwithstanding a request for information. He said that the entire watercraft of the American Barge Line was valued at \$1,200,000.00 and that one third of the value had been allocated to Louisiana for assessment purposes. The file which he produced merely showed the value and the allocation of one third, but the file did not show any reference to mileage. He said that the American Barge Line had refused to give him the mileage covered by equipment throughout the year and the mileage in Louisiana.

He did not know, nor did he ascertain by actual investigation the number of boats owned by the American Barge

Line, and never furnished any information to the Commission other than the fact that letters had been written requesting information, and his total participation in the assessment was simply to say that Mr. Johnson, representing the Tax Commission, had requested the information, which was not given. He stated: "As a matter of fact, I didn't know what the mileage was in the State of Louisiana because they had refused to give us the information."

He testified substantially the same with reference to the DeBardeleben Coal Corporation. He said he had nothing to do with making any assessment of the water equipment of the DeBardeleben Coal Corporation. He says the DeBardeleben assessment was placed at \$212,500.00 and that takes an over-all, of all the barges; that in the back of the return DeBardeleben had rendered one collier, one derrick, barge 15 and spare parts, under their watercraft. They made a return as if all this equipment was in the City of [fol. 331] New Orleans. He said there was no record of the number of barges upon which the assessment was based. The witness admitted that the document to which he was referring was a balance sheet required by the Tax Commission, and that the rendition says: "Floating watercraft, Harbor: New Orleans; \$117,000; end of taxable year, \$98,487." The witness admitted that the balance sheet represented the property owned by the corporation within and without Louisiana. The witness testified as follows:

"Q. Will you look in that file and see if there is any thing in that file which shows the number of barges which entered into the assessment.

"A. The assessment is placed at \$212,500, and that takes an over-all, of all the barges. Now, in the back, the DeBardeleben have rendered one collier, one derrick, barge 15, and spare parts, under their watercraft.

"Q. Do you know, as a matter of fact, that all of that equipment was permanently located in the City of New Orleans, and was returned by the DeBardeleben Coal Corporation for assessment purposes?

"A. They made that return as if it was in the City of New Orleans.

"Q. Yes. Now then, how many barges formed the basis of the assessment which has been added?

"A. There is no record of the number of barges.

"Q. Now, is there any fact in that file which shows the basis of the assessment?

"A. There is a rendition here, made by the DeBardeleben Coal Company. It says, "Floating and other marine equipment." And they have the value as carried out here, as \$425,183.

"Q. Well, that's the equipment, isn't it, Mr. Mann, that we are talking about being in the harbor of New Orleans and being located permanently here?

[fol. 332] "A. No, sir, I would judge that would be all of their equipment, Mr. Moreno floating and other stuff.

"Q. Well now, that's merely a balance sheet that is required by the Tax Commission, isn't it?

"A. That it would be a rendition made by the company, I'd say.

"Q. But it's the copy of the balance sheet, isn't it?

"A. Yes, sir.

"Q. And it is not a rendition for tax purposes of the property which is subject to taxation?

"A. Here is their rendition on this, Mr. Moreno. It says, "Floating Watercraft, Harbor: New Orleans; \$117,000; end of taxable year, \$98,487."

"Q. Now then, that is a different amount from the amount you just read off?

"A. Yes, sir, that is on the balance sheet.

"Q. Now, as an employee of the Tax Commission, don't you know what you have asked for is a balance sheet which includes all of the property located in Louisiana and which is not located in Louisiana? Isn't that right?

"A. Well, we don't ask for the balance sheet. We ask that their equipment is, for every corporation in the State; and in the—on outside corporations, we ask them what their over-all mileage would be in the state, over the United States, and what would it be in the State of Louisiana.

"Q. Mr. Mann, that isn't what I am asking you. Isn't it a fact that you request of the DeBardeleben Coal Corporation a balance sheet showing all its assets, regardless of where located?

"A. This is what—

"Q. Just a minute. And that balance sheet is shown on a white sheet of paper, headed, 'The DeBardeleben Coal Corporation Balance Sheet—January 1—December 31, 1941.' Isn't that correct?

[fol. 333] "A. That's there, but this is what the Tax Commission—

"Q. Won't you please answer the question; and I'll ask you others. Isn't it a fact that you request them for a balance sheet showing all of their property, all of their assets, regardless of where located?

"A. Well, I can't answer that as I do. I don't know.

"Q. Well, take a look at that balance sheet and tell me if that balance sheet which I have now handed you, which I have just described, does not represent all of the assets of the DeBardeleben Coal Corporation.

"A. Mr. Moreno, I can't—"

Mr. Lenfant: If it please the Court, I think that is beyond the province of the witness to answer whether that reflects all of the assets of the DeBardeleben Coal Corporation.

I don't know.

The Court: As a matter of fact, I think the point is well taken, Mr. Moreno. Your question was simply whether or not there was required,—

Mr. Moreno: Yes, sir.

The Court: —of the company, the production of its balance sheet, covering all of its property, whether in the State of Louisiana alone or wherever it might be.

Mr. Moreno: That's right, sir.

[fol. 334] The Court: Now, the witness should answer the question. Answer it.

A. Yes, sir.

By Mr. Moreno:

Q. Now then, this sheet which I show you, headed, "Taxpayer's Report, 1944; Received April 15, 1943." Isn't that the return for tax purposes, made by the DeBardeleben Corporation?

A. Yes, sir.

With regard to his knowledge of the towboats and barges which was the subject of the litigation he was asked if he had not testified in a deposition whether the only view he had of the towboats and barges was when he looked out of the fifth floor window of the Capitol Building at Baton Rouge and saw the boats going up and down the River. He answered: "No, sir. I think I testified, Mr. Moreno, that I saw them going along the river, from the Fifth Floor of the Capitol; I saw them when I was crossing the river on

the ferry at Baton Rouge; I saw them when I crossed the ferry at Donaldsonville; and at the Jackson ferry crossing; that on other ferries on the river." He was asked as to whether the only time he saw the boats, "so as to arrive at a value; was when you viewed them from the Fifth Floor of a building in Baton Rouge and when you saw them while crossing on ferry boats", and he answered: "Yes, sir." He made no inspection of either the towboats or the barges. He did not know how many barges he saw going up and down the river, but "I have seen lots of them, over a period of years." He didn't see every barge owned by the Mississippi Barge Line, and when asked if he knew how many [fol. 335] barges had come into Louisiana, he answered, "Well, I'll tell you, I do, if we can get—when we went to St. Louis and took the logs of those boats, according to the information of the superintendent there, all 80 of those barges came to New Orleans." He, himself, did not know of his own knowledge how many had come into Louisiana. And he did not know how many of the Union Barge Line barges had come into Louisiana.

On cross examination he testified he had written for information as to the number of barges and the mileage, which had been refused.

There is introduced the map showing the distance along the waterways of Louisiana purporting to have been issued by the DeBardeleben Coal Corporation, which is admitted over objections, but admitted only as to the DeBardeleben Corporation and not as to the other defendants. This map was in the files of the Tax Commission since 1943 but the part of 1943 is not shown. The witness stated that he would show the points to which the DeBardeleben Corporation could operate its Coyle Lines, but the witness did not know over what mileage it had operated, based upon the map.

Charles C. Zatarain, another member of the Commission, testified that he had never seen any of the taxed equipment in the sense of examining it. He testified as follows:

"Question. You know nothing of the values of the property of the Mississippi Valley Barge Line Company which enters into this assessment of \$450,000.00?"

"Answer. No, I do not."

[fol. 336] "Question. What connection, if any, do you have in connection with this assessment of \$450,000.00?"

"Answer. Well, the matter had been investigated by field men and worked by the staff by Mr. Cain and presented to the Commission and we agreed to the figures that they arrived at."

"Question. On the same basis as indicated by the testimony by Mr. Cain here today?"

"Answer. That is right."

Mr. Zatarain testified that the Commission had field men and assessors, who make the assessment, and that their procedure on this water craft was on the basis of mileage, as is the case of rolling stock; that he did not know the mileage of the American Barge Line Company boats in Louisiana as compared with their total mileage, in the absence of the American Barge Line Company giving the Tax Commission this information, any more than he would know the mileage made by railroad cars owned by a railroad.

He stated that the assessments should be based on the report filed by the taxpayer, and that in the absence of such report, after requesting it, the Commission would make an assessment comparable with assessments of similar property; that when they make an assessment on the mileage, if it is not in line with the records of the Barge Line Company, it is up to the Barge Line Company to present their case to the Commission or assessor, and show reason why there should be an adjustment; that the file of the Louisiana Tax Commission shows that the Commission made a second request of this Barge Line Company, which information had never been received. He stated that Louisiana is one of the largest terminals of the American Barge Line Company, and it is presumed one-third of the total mileage allotted to the State of Louisiana would be fair to this taxpayer; that the Commission had no other procedure to follow when the American Barge Line Company refused constantly to give the information requested. He stated that the mileage basis of the DeBardeleben Coal Corporation would be different because DeBardeleben operated principally out of New Orleans with their boats, and that New Orleans is their headquarters.

Mr. Zatarain further testified that the Union Barge Line Corporation stated that they did not intend to make a rendition of their watercraft to the Louisiana Tax Commission; that it was likewise necessary to make an assess-

ment on the Union Barge Line Corporation watercraft in the absence of specific information from them; that they had to make an estimate because of the inability of the Tax Commission to secure the information from the taxpayer.

He further testified that the matter of the assessment of the Mississippi Valley Barge Line watercraft had been investigated by the Tax Commission's field men and worked by their staff with Mr. Cain and presented to the Tax Commission, and the Tax Commission agreed to the figures arrived at.

He said he was a member of the Louisiana Tax Commission during 1943 and 1944 said that he did not make the actual assessment, because they have field men and assessors who make the assessments. He did not recall taking any active part in the assessment and did not know how it was made. He said: "The usual procedure is on a basis of mileage, mileage covered in the State, just the same as rolling stock." He did not know what mileage was covered by the tow-boats and barges within and without Louisiana, [fol. 338] and did not know the proportion of mileage in Louisiana as compared with the total mileage of the tow-boats and barges, "not anymore than I would understand or know the mileage made by railroad cars"; that all he did was to acquiesce in the assessment. He did not know by whom the report was made to the Louisiana Tax Commission.

On cross examination he testified that assessments are made upon field reports where the taxpayers, when requested, refuse to sign their report; "in the absence of any signed report, which is the procedure that should be followed; their only alternative, after making several requests, would be to put an arbitrary assessment. Whether this party filed a report, I don't know. I don't have a file here to indicate that they did or they didn't." When asked as to the use of the word "arbitrary" he said it did not mean just to stick on an assessment but to make the assessment compare with the assessments of similar property on which returns have been made. He said by an arbitrary assessment, if the property is *the property* is subject to the taxing power of Louisiana and a taxpayer does not make a return, he puts a value upon the property "based on our estimation of the mileage covered and the amount of equipment, and so forth." But if he did not know what the mileage is, "well, we have to estimate the mileage within the State

and anticipate the mileage that they would cover from entering the State to its terminals, and then out." He did not know the mileage covered by the tow-boats and barges outside of Louisiana. He could only estimate the mileage in Louisiana as to what portion of the mileage between the two terminals. "If they plied between St. Louis and New Orleans we would have to estimate it on that basis." He estimated the mileage between St. Louis and New Orleans "on the number of pieces of equipment and the number of [fol. 339] miles between the state line and the terminal here." Asked how he would reach his mileage if he did not know the mileage, he said: "That would be very easy to get by a reference to the mileage schedule."

"Question. Suppose the tow-boat did not come all the way from St. Louis, but operated down to Memphis and went back to St. Louis, or came down to Helena, Arkansas, and went back to St. Louis, how would you arrive at a mileage proportion?"

"Answer. Well, their rendition to the Tax Commission would show what boats were in the State and what period they were here.

"Question. Now, in the case of the American Barge Line, they did not make such a rendition, did they?"

"Answer. I don't know."

He was asked: "How could you arrive at the mileage under this circumstance?" and answered: "Just on the basis outlined there just now, on the mileage, we might anticipate, and then, if in their opinion it is not in line with their records, it is up to them to present their case to the Commission or to the Assessor; and show reason why it should not be adjusted." When asked if the taxpayer had not made a rendition, if it were not a fact that the Commission "just simply arbitrarily picked the mileage?" he answered: "Well, that would be based upon the number of pieces of equipment they have." He was then asked how he would figure the equipment in relation to the mileage, and answered: "If the amount of the water covered by them is one-third in Louisiana, and they had five, ten or twenty boats, it would be rather easy to determine the proportion allocated to Louisiana." He said he did not know the mileage traveled inside of Louisiana and outside of Louisiana. He was then asked if, notwithstanding the absence of such [fol. 340] knowledge, he allocated one-third of the equip-

ment to Louisiana, he answered: "The file might indicate what formula was used." When asked to look at the file, he said: "There's no report or rendition in the file. There is a copy of a letter from our office making a second request for information which had not been received." When asked if the file showed any basis for arriving at the one-third valuation, he answered that he found copies of letters requesting the information but did not find any facts which would show any basis for allocating one-third of the value of the entire property for tax purposes. When asked if there is anything which would justify the choice of one-third for assessment purposes, he answered: "There is nothing indicating—it might have been one-half instead of one-third. Or might have been three-fourths in the absence of any real basis for making the assessment." When asked if it were a fact one-third was chosen because it was believed to be fair, but there is no basis of reaching the conclusion of fairness he answered: "This file does not indicate it," and without any basis for choosing one-third the assessment was made "in the absence of the information having been furnished. I would say that would be arbitrary"; that the choice would be wholly an arbitrary choice, and that he did not know whether one-third or one-fourth or one-fifth would be the proper proportion to be allocated to Louisiana. He said: "Louisiana is one of their largest terminals, and it is presumed that one-third would be fair to the taxpayer." When asked why he said "Louisiana is one of the largest terminals", and where others were located, he answered: "St. Louis; I don't know the others", and had no basis for making that statement "except the fact this is the largest terminal on the Mississippi River, and I don't think they would carry that much traffic in Vicksburg or 'Memphis.'" He did not know the point of calls of the taxpayer on the [fol. 341] Mississippi River and had no basis for making the statement that one of the largest terminals is in Louisiana because he had no basis of comparison, and that statement is wholly baseless because he does not know where the terminals are.

He also testified that the same method was used in connection with the Mississippi Valley Barge Line and the DeBardeleben Coal Company, and the Union Barge Line, and for the same reasons.

Mr. H. H. Huckaby, a member of the Tax Commission, testified substantially as had Mr. Zatarain.

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Mr. Huckaby stated that the Louisiana Tax Commission sits more or less in judgment on assessments by field officers, and pass-judgment whether the amount is proper or not.

He stated that the Barge Line Companies were requested to furnish the mileage in Louisiana as compared with their total mileage and other pertinent information, which information these Barge Line Companies refused to give.

Mr. John H. Fetzner, another member of the Louisiana Tax Commission, also testified substantially as had Mr. Zatarain.

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[fol. 342] Mr. Fetzner further said the Louisiana Tax Commission bases its opinion on the information it gets from its field assessors and the members do not investigate the property themselves; that the Tax Commission has no other source of information concerning the movements of the vessels of these Barge Line Companies, other than the information which is sought from the owners, or which their field inspectors can get for the Commission, and that he knows of no other office where this information would be recorded, and that the sole source of the information is the taxpayer himself; and when a taxpayer has refused the information, the Commission must rely on their fieldmen's opinion.

Mr. John J. Brennan, Chief Clerk to the Assessor of the First Municipal District of New Orleans, testified:

That the Louisiana Tax Commission by resolution ordered the assessors in the City of New Orleans to place the assessments on their books against the various Barge Line Companies operating in New Orleans.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EAST-
ERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Civil Action No. 844

DeBARDELEBEN COAL CORPORATION

vs.

JESS S. CAVE, Commissioner of Public Finance and Ex-Officio
City Treasurer

NOTICE OF APPEAL TO UNITED STATES CIRCUIT COURT OF
APPEALS, FIFTH CIRCUIT—Filed January 13, 1947

To the Honorable Court Aforesaid:

Notice is hereby given that Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City [fol. 343] of New Orleans, substituted Public Officer for Jess. S. Cave, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on October 6, 1946.

(Sgd.) Henry G. McCall, City Attorney. Alden W. Muller, Assistant City Attorney. Howard W. Lenfant, Of Counsel, Attorneys for Appellant, Lionel G. Ott.

Room 203, City Hall, New Orleans, La.

New Orleans, La., January 13, 1947.

IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

ORDER FIXING SUPERSEDEAS BOND—Filed January 13, 1947

To the Honorable Court Aforesaid:

On motion of Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, substituted successor of Public Officer Jess S. Cave, appearing herein through undersigned counsel, and

on suggesting to this Honorable Court that mover and defendant herein, the said Lionel G. Ott, in his said official capacity, desire to file a notice of appeal and also at the same time desires to file a supersedeas bond for stay of execution under judgment rendered by the Trial Court in this matter;

[fol. 344] And on further suggesting to this Honorable Court that the money sought to be recovered in this cause is being kept separate and apart and segregated from the general funds of mover herein and is therefore amply secured in accordance with Rule 73 of subsection (d) of the Federal Rules of Civil Procedure and that a supersedeas bond in the full amount of the judgment is therefore unnecessary.

It Is Ordered that defendant, Lionel G. Ott, in his said official capacity, mover herein, be and he is hereby authorized and permitted to file a supersedeas bond in the amount of Two Hundred Fifty Dollars (\$250.00) in the above numbered and entitled matter and that the execution of judgment be stayed in this matter to the same extent and purpose as if a supersedeas bond had been given in the full amount of judgment rendered herein.

New Orleans, La., January 13th, 1947.

(Sgd.) Wayne G. Borah, Judge. Henry G. McCall, City Attorney. Alden W. Muller, Assistant City Attorney. Howard W. Lenfant, Of Counsel, for Mover and Defendant herein.

Room 203, City Hall, New Orleans, La.

[fol. 345] Plaintiff, DeBardeleben Coal Corporation, through undersigned counsel, does hereby waive notice and hearing on the above motion and concurs therein and consents and agrees that supersedeas bond in the amount of \$250.00 is ample and sufficient in this matter.

Arthur A. Moreno, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

SUPERSEDEAS BOND—Filed January 13, 1947

Know all men by these presents, that I, Lionel G. Ott, substituted Public Officer for Jess S. Cave, Commissioner

of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, as principal and American Employers' Insurance Co. of Boston, as surety, are held and firmly bound unto DeBardeleben Coal Corporation, in the sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said DeBardeleben Coal Corporation, its attorneys, successors, or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 13th day of January, 1947.

Whereas, on October 16, 1946, in an action in the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, between DeBardeleben Coal Corporation, plaintiff, and Lionel G. Ott, defendant, a judgment was rendered against the said Lionel G. Ott [fol. 346] and the said Lionel G. Ott has duly filed a notice of appeal from said judgment.

Now, the condition of this bond is that if the said Lionel G. Ott shall prosecute his appeal with effect and satisfy the said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full or such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award, then this obligation to be void, otherwise to remain in full force and effect.

(Sgd.) L. G. Ott, American Employers Ins. Co., by
Hilton Sandoz, Attorney-in-fact.

Witnesses:

(Sgd.) Alden W. Muller, Mildred C. Stoddard.

Approved this — day of —, 1947.

— — —, United States District Judge.

Hardin & Ferguson, Inc., (Sgd.) N. Ferguson, Vice-Pres.

[fol. 347] IN UNITED STATES DISTRICT COURT

[Number and Title Omitted]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed
February 20, 1947

Clerk, United States District Court, Post Office Building,
New Orleans, Louisiana.

In accordance with rule 75 (f) of the Rules of Civil Procedure, DeBardeleben Coal Corporation, through its attorneys, Lemle, Moreno & Lemle, Hibernia Bank Building, New Orleans, Louisiana, and Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, substituted public officer to Jess S. Cave, through his attorneys, Henry G. McCall, Alden W. Muller, and Howard W. Lenfant, City Hall, New Orleans, Louisiana, by joint stipulation, hereby designate to constitute the record of the proceedings herein for the transcript of appeal to be sent to the United States Circuit Court of Appeal, the following numbered pleadings and the motions, minutes, orders, and judgments hereinafter set forth:

1. Original bill of complaint, filed June 24, 1944.
2. Answer filed on July 13, 1944.
3. Minute entries appearing in submission on January 14, 1946, and January 15, 1946.
4. Narrative of the evidence, findings of fact, conclusions of law and order to enter judgment of Honorable Adrian J. Caillouet, Judge, originally dated September 5, 1946, as [fol. 348] amended and corrected by order dated September 13, 1946, comprising thirty-eight typewritten pages, together with order making corrections in said narrative of evidence, findings of facts, and conclusions of law dated September 13, 1946, by Honorable Adrian J. Caillouet, Judge, comprising one typewritten page.

Starting Copy 348-357—9.7 A. M.

5. Judgment entered October 16, 1946.
6. Notice of appeal filed January 13, 1947.
7. Motion to fix supersedeas bond filed January 13, 1947.
8. Order permitting filing of supersedeas bond entered January 13, 1947.

9. Supersedeas bond of appeal filed January 13, 1947.
10. Joint designation of contents of record.

(Sgd.) Arthur A. Moreno, Lemle, Moreno & Lemle, Attorneys for DeBardeleben Coal Corporation, Appellee. Henry J. McCall (L), Alden W. Muller (L), (Sgd.) Howard W. Lenfant; Attorneys for Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Appellant.

[fol. 349] IN UNITED STATES DISTRICT COURT

(Number and Title Omitted.)

SUPPLEMENTAL JOINT DESIGNATION OF CONTENTS OF RECORD
ON APPEAL—Filed August 6, 1947

Clerk, United States District Court, Post Office Building,
New Orleans, Louisiana.

In accordance with rule 75 (f) of the Rules of Civil procedure, DeBardeleben Coal Corporation, through its attorneys, Lemle, Moreno & Lemle, Hibernia Bank Building, New Orleans, Louisiana, and Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, substituted public officer to Jess S. Cave, through his attorneys, Henry G. McCall, Alden W. Muller and Howard W. Lenfant, City Hall, New Orleans, Louisiana, by joint stipulation, hereby designate, in addition to the original declaration of contents on appeal, the following numbered supplemental testimony, exhibits, statements, motions, and designations to constitute the record of the proceedings herein for the transcript of appeal to be sent to the United States Circuit Court of Appeal:

11. Condensed narrative of entire testimony—by agreement of counsel.

12. Exhibit—"Huckaby III".

13. Statement of points relied on by defendant in the appeal.

[fol. 350] 14. Joint motion for certain exhibits to go up in the original.

15. Supplemental joint designation of contents on appeal.

(Sgd.) Arthur A. Moreno, Lemle, Moreno & Lemle, (Lemle, Moreno & Lemle), Attorneys for Appellants. (Sgd.) W. C. Perrault (L), B. I. Cahn (L), Henry G. McCall (L), Alden W. Muller (L), H. W. Lenfant, Attorneys for defendant, Appellants.

IN UNITED STATES DISTRICT COURT

(Number and Title Omitted.)

STATEMENT OF POINTS RELIED ON BY DEFENDANTS-APPELLANTS
IN THE APPEAL—Filed August 6, 1947

1. That the Trial Judge erred in holding that the State of Louisiana and the City of New Orleans do not have the right, under the law, to assess an ad-valorem tax on the tow-boats and barges of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Company on the proportionate rule basis; that is, the State of Louisiana and the City of New Orleans assessing but a part of the valuation of these tow-boats and barges for the mileage travelled in New Orleans [fol. 351] and Louisiana and reserving to the other States through which they operate, the right, if they so desire, to assess these tow-boats and barges, on the balance or remainder of the valuation, so as to refrain from assessing the boats and barges in toto for more than one hundred per cent of their value.

2. That the laws of the State of Louisiana expressly give to the State of Louisiana and the City of New Orleans the right to so assess these boats and barges in this manner, as shown by Act 179 of 1898, as amended by Act 39 of 1932, as Amended by Act 152 of 1932, as amended by Act 59 of 1944 of the Legislature of the State of Louisiana.

3. That the Trial Judge was correct in holding that the State of Louisiana and the City of New Orleans had the right to tax the watercraft of the DeBardeleben Coal Corporation, operating in and through the Port of New Orleans and the State of Louisiana, under his findings of fact, that New Orleans was the principal office and main base of oper-

ations of the Marine Division of this Corporation; yet the Trial Judge erred, under his findings of fact, that the State of Louisiana and the City of New Orleans sought to include in this assessment eight barges of the DeBardeleben Coal Corporation which were permanently located in the State of Alabama, because nowhere in the record can it be shown where the State of Louisiana and the City of New Orleans ever sought to tax or did tax these eight barges in the State of Alabama, but only sought to, and only actually taxed the boats and barges operating in and through the Port of New Orleans and the State of Louisiana.

4. That while the Union Barge Line Company is a Pennsylvania Corporation, yet there is nothing under any law [fol. 352] that would prevent the State of Louisiana and the City of New Orleans, from assessing on the proportionate rule basis, the watercraft equipment of the Union Barge Line Corporation, for as shown by the record, their watercraft operates just as regularly in the City of New Orleans and the State of Louisiana, as it does in the State of Pennsylvania.

5. That while the American Barge Line Company, the Mississippi Valley Barge Line Company and the DeBardeleben Coal Corporation are all Delaware Corporations, it was admitted by each of these plaintiffs that their watercraft, which is sought to be taxed here, never goes to the State of Delaware, consequently the State of Delaware, the corporate domicile, has no legal right to levy an ad valorem tax on this watercraft.

6. That the record shows that each of the four plaintiff Companies mentioned herein operated watercraft continually and regularly in and through the port of New Orleans and the State of Louisiana, during each of the years in question.

7. That the amount of the assessment and the method of assessment used in these respective cases by the Louisiana Tax Commission, cannot now be attacked here by plaintiffs for the reason that each of the plaintiffs herein have arbitrarily refused to give the Louisiana Tax Commission the information sought by the Louisiana Tax Commission, in advance, by their field men and by tax forms sent to each plaintiff, by their field men and *and* numbers of their water-

craft; the value; the number of miles travelled in Louisiana compared to the number of miles travelled over their entire system, etc., the Louisiana Tax Commission being forced to make an arbitrary assessment of a portion of the value [fol. 353] of the watercraft of each of these barge lines on the basis of the information available to it.

8. That each of the plaintiff barge lines is now estopped from attacking or complaining of the amount of the assessment or the method of the assessment, for the reasons that they did not avail themselves of the provisions of the Louisiana law for a hearing before the assessing authorities, or the Louisiana Tax Commission, within the time prescribed by law, or by applying to the Courts within the time prescribed by law, under the Louisiana Law, to correct any errors in the assessment or the method of assessment.

Henry G. McCall (L.), Alden W. Muller (L.), W. C. Perrault (L.), B. I. Cahn (L.), (Sgd.) H. W. Lenfant, of Counsel for defendants-appellants.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER FOR EXHIBIT TO GO UP IN THE ORIGINALS Filed August 11, 1947

On the joint motion of DeBardeleben Coal Corporation, through its attorney, Lemle, Moreno & Lemle, Hibernia Bank Building, New Orleans, Louisiana, and Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, substituted public officer to Jess S. Cave, through his attorneys, Henry G. McCall, Alden W. Muller and Howard W. Lenfant, City Hall, New Orleans, Louisiana, and, on [fol. 354] suggesting to this Honorable Court that certain exhibits have been filed in the above numbered and entitled matter, as well as in similar cases, all consolidated for trial, and that because of the nature and characteristics of said exhibits they should be sent to the U. S. Circuit Court of Appeal in the original.

It is ordered that the following exhibits be and they are hereby ordered sent to the United States Circuit Court of Appeal, in the original:

Delaware Law No. 1.
Huckaby I.

Huckaby II.
 Huckaby IV.
 Huckaby V.
 Huckaby VI.
 Huckaby VII.
 Huckaby VIII.

DeBardeleben Coal Corp.: Balance Sheet dated Jan. 1
 and Dec. 31, 1942.

DeBardeleben Coal Corp.: Exhibit No. 1.

DeBardeleben Coal Corp.: Exhibit No. 2.

Union Barge Line Exhibit No. 2.

[fol. 355] Union Barge Line Exhibit No. 3.

Union Barge Line Exhibit No. 4.

Mississippi Valley Barge Line Exhibit No. 1.

Mississippi Valley Barge Line Exhibit No. 2.

Mississippi Valley Barge Line Exhibit No. 3.

Mississippi Valley Barge Line Exhibit No. 4.

American Barge Line Co. Exhibit No. 1.

American Barge Line Co. Exhibit No. 2.

American Barge Line Co. Exhibit No. 3.

American Barge Line Co. Exhibit No. 4.

American Barge Line Co. Exhibit No. 5.

American Barge Line Co. Exhibit No. 6.

Exhibit 6 (Interstate Commerce Commission).

Exhibit 5 (Interstate Commerce Commission).

Mann I.

Mann II.

Defendants Mann 1.

Defendants Mann 2.

[fol. 356] Defendants Mann 3.

Defendants Mann 4.

Defendants Mann 5.

Defendants Mann 6.

Defendants Mann 7.

Defendants Mann 8.

Defendants Mann 10.

Defendants Mann 11.

Defendants Mann 12.

Defendants Mann 13.

(Sgd.) Ben C. Dawkins, Judge.

Aug. 8, 1947.

(Sgd.) Arthur A. Moreno, Attorney for Plaintiffs-Appellees. W. C. Perrault (L.), B. I. Cahn (L.), Henry G.

McCall (L.), Alden W. Muller (L.), (Sgd.) Henry W. Lenfant, Attorneys for Defendants-Appellants.

[fol. 357] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 358] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12117

[Title omitted]

ARGUMENT AND SUBMISSION—January 28th, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 359] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12118

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 360] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12119

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 361] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12120

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 362] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12121

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 363] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12122

[Title omitted]

ARGUMENT AND SUBMISSION—January 28th, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 364] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12123

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 365] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12125

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 366] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12126

[Title omitted]

ARGUMENT AND SUBMISSION—January 28, 1948

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 367] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DE BARDELEBEN COAL CORPORATION, Appellee

No. 12117

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12118

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,
versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12119

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

[fol. 368]

No. 12120

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,
versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12121

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12122

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12123

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

UNION BARGE LINE CORPORATION, Appellee

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

[fol. 369]

No. 12125

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

Appeals from the District Court of the United States for
the Eastern District of Louisiana

Before Hutcheson, McCord, and Lee, Circuit Judges

OPINION—FILED March 5 1948

Lee, Circuit Judge:

These suits were brought by appellees for the return of *ad valorem* taxes assessed and collected by the City of New Orleans and the State of Louisiana. They were consolidated for the purpose of trial as they are for the purpose of appeal.¹

¹ The taxes were paid under protest under the terms of Act 330 of 1938, which provides that in case any taxpayer resists the payment of the amount assessed against him or the enforcement of any provision of law in relation thereto, the amount shall be paid by the taxpayer but kept segregated; a right of action is given the taxpayer to contest in any State or federal court having jurisdiction the invalidity he insists upon, and, if he prevail, the taxes paid shall be returned with interest.

[fol. 370] The four appellees, Mississippi Valley Barge Line Co. (hereinafter called "Mississippi"), American Barge Line Co. ("American"), Union Barge Line Corporation ("Union"), and DeBardeleben Coal Corporation ("DeBardeleben"), as their names imply, operate large lines. Mississippi, American, and DeBardeleben sued for return of taxes collected for the years 1944 and 1945, while Union sued for return of taxes collected for the year 1945.² The taxes were levied under assessments made by the Louisiana Tax Commission under Act 152 of 1932, as amended by Act 59 of 1944, on the proportion of appellees' lines in Louisiana as compared to their entire systems. Appellees' petitions all follow the same general trend, that the tax is unconstitutional because it is a burden upon interstate commerce, because it violates the due-process clause of the State and federal Constitutions, and further that the assessments were arbitrary and capricious. Appellants contend that the taxes were constitutional and proper, and further that the question of assessments, that is, the method of making them and the amount thereof, is not now before the court, since appellees did not avail themselves of the administrative remedies given them by the Louisiana law. The trial below resulted in judgments for each of the appellees, ordering the return of the taxes paid, the court holding that in the cases of Mississippi, American, and Union, the retention of the taxes by appellants constituted the taking of property without due process of law in violation of the federal and State [fol. 371] Constitutions and holding in the case of DeBardeleben that while Louisiana had the right to tax such of its property as had a tax situs in Louisiana, the assessment on the proportionate rule basis as made was illegal, null, and void. From the eleven judgments in favor of appellees, both appellants have appealed.

² Mississippi Valley Barge Line Co. and American Barge Line Co. each are plaintiffs in two suits against the Commissioner of Public Finance for the City of New Orleans and in two suits against the State Tax Collector for the City of New Orleans. The DeBardeleben Coal Corp. is plaintiff in two suits against the Commissioner of Finance for the City of New Orleans, and the Union Barge Line Corp. is plaintiff in one suit against that Commissioner. one suit against that Commissioner.

The question common to the various appeals is, whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there.

The record shows that each of the appellees is a corporation chartered under the laws of States other than Louisiana. American, Mississippi, and DeBardeleben are Delaware corporations, and Union is a Pennsylvania corporation. None of the watercraft of American, DeBardeleben, or Mississippi was ever physically within the State of Delaware, but some, if not all, of the taxed property of Union was present during the tax year within the State of Pennsylvania. American and Mississippi maintain offices in New Orleans, though their principal business offices are in Louisville and St. Louis, respectively. Union merely employs an agent in New Orleans for the conduct of its business; its principal office is in Pittsburgh. The principal office of the Marine Division of DeBardeleben is in New Orleans; its official home office is in Birmingham, Ala. Each of the four corporations is engaged in transportation of freight upon inland waterways of the United States under authority of a Certificate of Public Necessity and Convenience issued by the Interstate Commerce Commission. The taxed towboats of American and DeBardeleben are enrolled [fol. 372] under United States Shipping Regulations pertaining to vessels engaged in domestic commerce (Title 46, c. 12 U. S. C. A.), at Wilmington, Del., and there, too, they have registered their barges. The towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi are enrolled at St. Louis. Under neither Delaware nor Pennsylvania law is the marine equipment of the appellees subject to State taxation.

DeBardeleben operates from New Orleans to Houston, Galveston, and Corpus Christi, in Texas; in Alabama, as far as Mobile; in Florida, to Pensacola, Panama City, and Carrabelle; and in the tax years in question its watercraft made occasional trips up the Mississippi to points north of the Louisiana boundary. The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports out-

side Louisiana. These turn-arounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered by the interstate commerce operations in 1943, American's towboats spent about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spent about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944, Union's towboats spent about 2.2% and its barges about 4.3%. Ap-[fol. 373] pellees' watercraft, while in the port of New Orleans have the benefit of such fire protection as is afforded all craft moored to the wharves, and of harbor police surveillance, and of all sanitary regulations of the State and City Boards of Health.

DeBardeleben was merged or consolidated in 1937 with W. G. Coyle, Inc., a Louisiana corporation which had operated a Marine Terminal and harbor traffic business within the port of New Orleans. To Coyle's operations in 1934 had been added a common carrier water transportation business, mainly in the Gulf Intracoastal Waterways, running westerly as well as easterly from the port of New Orleans. After the merger in 1937, the Coyle operations were conducted as the Marine Division of DeBardeleben, without interruption or material change, under the name of Coyle Lines. The main office of the Marine Division of DeBardeleben, from which it controlled and carried on continuously all of the Coyle Line operations, was located in New Orleans, and so also was the machine and repair shop, maintained for upkeep and repair of its watercraft. At the New Orleans office the crews of the tows were regularly paid their wages, and to it the employees reported at the customary taking of the usual 24-hour lay-off at the end of each 6-day work period called for under the union labor contract. At the Coyle New Orleans Terminal, the tugs operated by Coyle Lines were usually fueled, and there, too, as a rule, were made all scheduled general repairs or minor voyage repairs needed by the Marine Division watercraft. None of the Coyle Lines watercraft ever permanently left the [fol. 374] original situs in Louisiana except eight barges especially assigned wholly to hauling company coal on the Warrior River in Alabama.

The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans. With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tugboats and barges having a tax situs there could be taxed by the City of New Orleans. But the court further found that in assessing the tugboats and barges there had been included in the assessment the eight barges permanently located in Alabama, and that such fact made the city tax against DeBardeleben illegal, null, and void. The correctness of these rulings with respect to the several companies is the sole question before us.

The Louisiana statutes under which the State and the City of New Orleans taxed the tugboats and barges of appellees are set out in a footnote.³

³ Act 152 of 1932 provides:

“ * * * the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State, or States, or whose sleeping cars run over any line lying partly within this State or partly within another State or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines.”

Act 152 of 1932 was amended by Act 59 of 1944. It provides:

“ ‘Movable Personal Property’—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusively, as the engines, cars and all rolling stock of railroads; the boats, barges and other water craft and floating equipment of water transportation lines); * * *

[fol. 375] Appellants contend that for the watercraft of American, Mississippi, and Union, New Orleans is the terminus into and out of which those lines haul the greater part of the freight handled by them; that the watercraft were loading and unloading in New Orleans throughout the tax years; and that in fact they were within the State of Louisiana more than in any other State. Appellants insist that under the doctrine of *Pullman's Palace Car Co. v. Penna.*, 141 U. S. 18, Louisiana has the right to tax the craft in question, upon the theory that they have an average continuous presence in Louisiana, the basis of assessment of each appellee being the ratio between the total number of miles of appellee's line in Louisiana and the total number of miles of the entire line. With respect to DeBardeleben, appellants contend that New Orleans, being the home port of its watercraft, was also its permanent tax situs; and that the failure and refusal of that corporation to give the information asked for or to make any assessment return for the tax years involved estopped it to contest the correctness of the assessment made against it. Each of the appellees [fol. 376] asserts that, the State of its domicile being elsewhere, it is liable to assessment in Louisiana only upon a showing that the watercraft had a permanent situs within the State during the tax years; and that no such showing was made. DeBardeleben further asserts that the lower court was right in setting aside the assessment made against it upon finding that the value of eight barges in Alabama had been included in the total value from which the local assessments were made.

As stated, the City of New Orleans and the State of Louisiana rely chiefly upon *Pullman's Palace Car Co. v.*

“(f) The ‘movable personal property’ of such persons, firms, or corporations, whose line, route, or system is partly within this State and partly within another state or states, shall be by the Commission valued for the purposes of taxation and by it assessed; . . .

“1. The portion of all of such property of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation.”

Penna., *supra*, as authority for the assessment against appellees. In that case the Supreme Court held that where tangible personal property such as freight and passenger cars are used daily by a railroad over fixed routes in interstate commerce, a State through which the railroad operates although not the State of its domicile may tax such tangible property upon the basis of the ratio between the mileage within the State and the total mileage of the railroad system. But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways. Under the decisions the regular or irregular stops at ports in nondomiciliary States of watercraft moving in interstate commerce do not establish tax situs in such States, and such watercraft remain taxable only by the State of the owner's domicile. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Ayer & Lord Tie Co. v. Kentucky*, [fol. 377] 202 U. S. 409; *So. Pacific Co. v. Kentucky*, 222 U. S. 63; cf. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292. Neither enrollment of a vessel at a particular port, even though the vessel makes regular calls at the port of enrollment, *St. Louis v. Wiggins Ferry Co.*, *supra*; *Ayer & Lord Tie Co. v. Kentucky*, *supra* nor benefits received at a port, such as fire protection and wharves for loading and unloading accorded to every vessel, of themselves confer the power to tax upon the State of the port. *Hays v. Pacific Mail S. S. Co.*, *supra*; *So. Pacific Co. v. Kentucky*, *supra*.

The fact that none of the watercraft owned by American, Mississippi, and DeBardeleben has been within the State of Delaware, the State of the owners' domicile, does not of itself control the right of that State to tax the property. Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries. *So. Pacific Co. v. Kentucky*, *supra*. That no tax has been assessed by the State of the owner's domicile has no bearing upon the right of another State to tax. It is only when the tangible personal property has acquired a tax situs within a State other than the owner's domicile that it may be taxed there. *Brown v. Houston*, 114 U. S. 622; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299.

Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American, and Union acquired no tax situs in Louisiana, and that [fol. 378] no tax could be legally assessed and collected by that State or by the City of New Orleans. We are also of the opinion that the Court below was correct in holding that the tugboats and barges of DeBardeleben, except the eight barges in Alabama, had acquired a tax situs in Louisiana. New Orleans clearly was the home port of DeBardeleben's watercraft. Its watercraft, except the eight barges in Alabama, were properly taxed there. The fact that the amount assessed against DeBardeleben was arrived at by including the value of the eight barges in Alabama is not ground for declaring the assessment against that company void. The taxpayer was called upon to furnish information and make its rendition for each of the tax years. Taking the position that it owed no tax, it refused to furnish any information and thus forced the taxing authority to get its information as best it could. Under the local law, if the taxpayer does not make a return, the taxing authority "shall himself fill out said list from the best information he can obtain." The DeBardeleben Coal Corporation was assessed 25% of the value of its tugs and barges. It urges that this was an excessive assessment, arbitrarily made without information either as to the miles it operated within the State in carrying on its business or as to the value of its properties. The evidence indicates that the taxing authority had little information upon which to act and that the assessments were made from estimates based on meagre and uncertain data. This was due in a large measure to DeBardeleben's refusal to furnish requested information. Instead of acting arbitrarily, the taxing authority obviously made the assessments from the best information it could obtain.

[fol. 379] The City of New Orleans has pleaded that the taxpayer, under Act 39 of 1922, is estopped to contest the correctness of the assessments because of its failure to make tax renditions on or before June 1 of the tax years. Construing a similar Act, the Supreme Court of Louisiana has held that the estoppel is not applicable where, as here, taxpayer's failure to file a rendition was based on the honest belief that its property was not taxable. *Travelers' Insurance Co. v. Board of Assessors, et al.*, 122 La. 129,

47 So. 439, 441, citing *Ceniral of Georgia Ry. v. Wright*, 207 U. S. 127.

In decreeing the assessments against DeBardeleben void, the court below erred. The erroneous inclusion of property in an assessment is ground for reduction, not cancellation. *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399. The DeBardeleben suits in effect are suits for cancellation, not reduction of the assessments, and, though under Louisiana practice reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation, *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120, a more liberal rule is followed in the federal courts. Under Rule 54 (c), Federal Rules of Civil Procedure, relief to which a taxpayer is entitled may be granted even though not demanded. The DeBardeleben suits will, therefore, be remanded in order that the court below may ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the tax years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest. [fol. 380] The judgments appealed from are affirmed in all these causes except No. 12,116 and No. 12,124; in those two causes the judgments appealed from are reversed, and the causes are remanded for further proceedings not inconsistent with this opinion.

[fol. 381] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12117.

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and the surety on the appeal bond herein, American Employers' Insurance Co. of Boston, be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12118

GEORGE MONTGOMERY, State Tax Collector, etc.,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

[fol. 382] It is further ordered and adjudged that the appellant, George Montgomery, State Tax Collector, etc., and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12119

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

AMERICAN BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged ~~that~~ the appellant, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and the surety on the appeal bond herein, American Employers' Insurance Co. of Boston, be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12120

GEORGE MONTGOMERY, State Tax Collector, etc.,

versus

AMERICAN BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; [fol. 383] On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, George Montgomery, State Tax Collector, etc., and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12121

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

AMERICAN BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and the surety on the appeal bond herein, American Employers' Insurance Co. of Boston, be condemned, in solido, to pay the costs of this cause in this Court.

[fol. 384] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12122

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and the surety on the appeal bond herein, American Employers' Insurance Co. of Boston, be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12123

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

UNION BARGE LINE CORPORATION

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

[fol. 385] It is further ordered and adjudged that the appellant, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and the surety on the appeal bond herein, American Employers' Insurance Co. of Boston, be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12125

GEORGE MONTGOMERY, State Tax Collector, etc.,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, George Montgomery, State Tax Collector, etc., and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc.,

versus

AMERICAN BARGE LINE COMPANY

JUDGMENT—March 5th, 1948

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; [fol. 386] In consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, George Montgomery, State Tax Collector, etc., and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court.

[fol. 387] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

[Titles Omitted]

No. 12,117

No. 12,118

No. 12,119

No. 12,120

No. 12,121

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

No. 12,122

No. 12,123

No. 12,125

[fol. 388]

No. 12,126

PETITION FOR REHEARING ON BEHALF OF LIONEL G. OTT, COM-
MISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREAS-
URER OF THE CITY OF NEW ORLEANS, AND OF GEORGE MONT-
GOMERY, STATE TAX COLLECTOR FOR THE CITY OF NEW OR-
LEANS—Filed March 25, 1948

To the Honorable the Judges of the United States Circuit
Court of Appeals for the Fifth Circuit:

The petition of Lionel G. Ott, Commissioner of Public
Finance and Ex-Officio City Treasurer of the City of New
Orleans, and of George Montgomery, State Tax Collector
for the City of New Orleans, appellants herein, respect-
fully show:

1. That judgments were entered herein against appellants
on March 5th, 1948.

2. That there were errors grievously prejudicial to these
appellants contained in said judgments of this court, which
should be corrected through the granting of a rehearing
herein.

[fol. 389] 3. That the Court erred in not applying the principle of tax apportionment to this watercraft using navigable inland waterways. In its decision this Court states:

“But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways.”

While this may, of itself, be true, yet conversely appellants believe the Court would be equally correct in stating that it has been unable to find where this tax apportionment has been denied under the facts in the cases at bar. In other words, this particular type of case has never been decided by our Courts, and the question is wide open for decision under the facts and the law applicable. The cases cited by the Court in support of the above finding are easily distinguishable from the issues here. There can be no question of the application of the old principle to ships plying the high seas, where unless the situs for the purpose of taxation was declared to be the actual or real domicile or real residence of the owner, it might result, as the Supreme Court has said “in a complete escape from taxation.” But not so here. An average number of this watercraft, as shown by the record, is in Louisiana every day of the year. This presents a different problem from the old cases, and calls for the application of a new principle. Certainly the Louisiana Statute covers this type of movement, and justice, equity and logic call for the tax apportionment principle to be applied to these inland barge lines. The Supreme Court in *Pullman's Palace Car Company v. Pennsylvania*, 141 [fol. 390] U. S. 18, 11 S. Ct. 35, 35 L. ed. 613 and similar cases, has approved the tax apportionment principle as applied to the rolling stock of railroads, and, try as they might, appellants are unable to discover any legal or sound distinction, from the railroad movement, in the movement of these towboats and barges in their constant and continuous schedule in and to Louisiana. Obviously, there is a physical distinction, but appellants can find no legal distinction. Appellants therefore respectfully urge that the Court would be on surer and sounder ground in following the tax apportionment principle in the railroad cases, rather than the principle in the old steamship cases.

4. That this Court further erred in holding that Delaware may tax the watercraft of American and Mississippi Valley. The Court sets forth in its decision:

"Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries,"

citing *Southern Pacific Co. v. Kentucky* (1911) 222 U. S. 63, 32 S. Ct. 13. That case involved ocean-going steamships, and too, it was clearly established that Kentucky was not only the actual domicile of the corporation but had its principal office there. But appellants have never been able to find where our Courts have allowed a state of domicile to tax property outside its boundaries where the corporate owner does no business in the state of incorporation; has no office there, but simply an agent for the service of process; has never sent its watercraft there; operates its entire business from offices located in other [fol. 391] states; pays no taxes there; and has no stockholders nor officers resident there. In all cases cited by the Court, there was either an actual or real domicile or a real residence as contradistinguished from a fictional residence, or a mere resting place for a charter. Even in the case of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150, Our Supreme Court denied to Kentucky (the actual domicile) the right to tax tangible personal property permanently located in other states. The facts in that case are more nearly analogous (as far as they apply) to the issues here, rather than the facts in *So. Pacific Co. v. Kentucky* (*supra*). Appellants therefore do not believe Delaware can tax the watercraft of American and Mississippi Valley. Yet tangible personal property must have a taxing situs somewhere! As said in *Union Refrigerator Transit Co. v. Kentucky* (*supra*):

"... the tendency has been in recent years to treat it (tangible property) as having a situs of its own for the purpose of taxation and correlatively to exempt at the domicile of the owner."

Appellants therefore respectfully submit that the Court erred in applying the principles in *Southern Pacific Co. v. Kentucky* (*supra*) rather than the principles in *Union Refrigerator Transit Co. v. Kentucky* (*supra*).

5. The Court further erred in denying to Louisiana its proportionate share of taxation on the watercraft of Union Barge Line Corporation. While Pennsylvania (the domicile) may tax this watercraft, under the holding in *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944), yet Louisiana is not prohibited, under the law from taxing a [fol. 392] portion of this watercraft. As was shown in *Northwest Airlines, Inc. v. Minnesota (supra)*, other states, besides Minnesota, were taking a portion of Northwest's aircraft. The Court had the opportunity to deny to these non-domiciliary States the right to tax this aircraft, yet refused to do so! This Court therefore, has the full right to allow this tax apportionment to Louisiana. It is submitted the law and the facts amply justify such a holding in favor of appellants here. Even if Pennsylvania should choose to tax the Union's watercraft, appellants submit there is no prohibition against double taxation in either the Fifth or the Fourteenth Amendments of our Constitution. Louisiana therefore has a right to its share of taxation on Union's watercraft.

6. The Court further erred in holding that the tugboats and barges of Mississippi, American and Union acquired no tax situs in Louisiana, and that no tax could be legally assessed and collected by that State or the City of New Orleans. Appellants submit that if the Court finds it necessary to find a taxing situs in Louisiana to establish the right to tax, then the record is replete with evidence to show that a portion of this watercraft is in Louisiana at all times which consequently clearly establishes a situs. These Lines maintain a continuous schedule into New Orleans throughout the year, leaving a portion of their watercraft here, every day in the year, and it is shown by the evidence that there is an average amount of this equipment in Louisiana at all times. If our Supreme Court had found it necessary to find a taxing situs for the equipment of the railroads, in [fol. 393] allowing the tax apportionment, they would have undoubtedly said an average number of this rolling stock was in the state throughout the year, and this, in effect, clearly establishes a taxing situs for the portion sought to be taxed. The exact thing can be said here, which appellants respectfully submit, can and should be said, as to this inland watercraft.

Wherefore, petitioners pray that a rehearing be granted them herein in order that the erroneous judgments entered against appellants in the above nine cases may be revised.

Respectfully submitted, Harry McCall, City Attorney.
Alden W. Muller, Asst.-City Attorney.

Fred S. LeBlanc, Attorney General. W. Charles Per-
rault, First Assistant Attorney General. Bertrand I. Cahn,
Special Assistant Attorney General.

Howard W. Lenfant, Special Counsel.

[fol. 394]

Certificate of Counsel

The undersigned, attorneys for appellants, hereby certify that in their judgment the foregoing Petition for Rehearing in this case is well founded and is not interposed for delay.

(Signed) H. W. Lenfant.

This is to certify that copies of this Petition for Rehearing have been served upon opposing counsel, on this 25th day of March, 1948.

(Signed) H. W. Lenfant, of Counsel.

[fol. 395] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Titles omitted]

No. 12117

No. 12118

No. 12119

No. 12120

No. 12121

No. 12122

No. 12123

No. 12125

[fol. 396]

No. 12126

ORDER DENYING REHEARINGS—April 13, 1948

It is ordered by the Court that the petitions for rehearing filed in these causes be, and they are hereby, Denied.

[fol. 397] IN SUPREME COURT OF THE UNITED STATES

No. 12117

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio, City Treasurer, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12118

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12119

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

No. 12120

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

No. 12121

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

No. 12122

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12123

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

vs.

UNION BARGE LINE CORPORATION, Appellee

No. 12125

GEORGE MONTGOMÉRY, State Tax Collector, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

PETITION FOR APPEAL—Filed July 16, 1948

[fol. 398] To the Honorable the Chief Justice and Associate
Justices of the Supreme Court of the United
States:

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their respective official capacities, petitioners herein, feeling themselves aggrieved by the decrees rendered and entered by the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled causes on the 5th day of March 1948, rehearing denied on the 13th day of April 1948, hereby appeal from the said decrees to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed hereon, and pray that their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decrees were based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

Petitioners further show that they have previously presented their petition for appeal herein to the United States Circuit Court of Appeals for the Fifth Circuit and that said Court has denied said petition for appeal, as per certified copy of order denying appeal attached hereto, and that petitioners therefore present their application for appeal herein direct to a Justice of the Supreme Court of the United States as provided in Rule 36, paragraph I of the Rules of this Honorable Court.

Bolivar E. Kemp, Attorney General for the State of Louisiana; Carroll Buck, First Assistant Attorney General; Henry G. McCall, City Attorney for City of New Orleans; (Signed) Henry B. Curtis, First Assistant City Attorney; Alden W. Muller, Assistant City Attorney; (Signed) Howard W. Lenfant, Special Counsel, Attorneys for Petitioners.

Appeal allowed July 9, 1948.

Robert H. Jackson, Associate Justice U. S. S. Court.

[fol. 399] IN SUPREME COURT OF THE UNITED STATES

[Titles omitted.]

ASSIGNMENTS OF ERROR—Filed July 16, 1948

[fol. 400] Comes now, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their official capacities, petitioners, in the above entitled causes, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said causes from the decrees of the United States Circuit Court of Appeals for the Fifth Circuit, entered on the 5th day of March 1948, rehearing denied on the 13th day of April 1948:

1. The Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisi-

ana to collect its share of the taxes on these towboats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

2. The Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

3. The Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

4. The Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

5. The Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of-law clause of the 14th Amendment of the Constitution of the United States.

6. The Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.

[fols. 401-402] Wherefore petitioners pray that the said decrees may be reversed, and for such other and further relief as to the court may seem just and proper.

Bolivar E. Kemp, Attorney General for the State of Louisiana; Carroll Buck, First Assistant Attorney General; Henry G. McCall, City Attorney for the City of New Orleans; (Signed) Henry B. Curtis, First Assistant City Attorney; Alden W. Muller, Assistant City Attorney; (Signed) H. W. Lenfant, Special Counsel, Attorneys for Petitioners.

[fol. 403] IN SUPREME COURT OF THE UNITED STATES

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc., Appellant,

vs.

UNION BARGE LINE CORPORATION, Appellee

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

vs.

AMERICAN BARGE LINE COMPANY, Appellee

ORDER ALLOWING APPEAL—July 9, 1948

[fol. 404] The appellants in the above entitled causes, having prayed for an allowance of an appeal to the Supreme Court of the United States from the decrees made and entered in the above-entitled causes by the United States Circuit Court of Appeals for the Fifth Circuit on the 5th day of March 1948, rehearing denied April 13, 1948, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It Is Now Herein Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the United States Circuit Court of Appeals for the Fifth Circuit in these nine causes as provided by laws; and it is

Further Ordered that the Clerk of the said court shall prepare and certify a transcript of the record, proceedings and decrees in these nine causes, and transmit the same to the Supreme Court of the United States so that he shall have the same in the said court within 40 days of this date; and it is

Further Ordered, that security for costs on appeal be fixed in the sum of two hundred dollars (\$200.00).

(Sgd.) Robert H. Jackson.

July 9, 1948.

[fols. 405-407] Citation in usual form showing service on Arthur A. Moreno, filed July 16, 1948, omitted in printing.

[fols. 408-409] Bond on appeal for \$200.00 approved and filed July 27, 1948, omitted in printing.

[fol. 410] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Titles omitted]

PRAECIPE FOR RECORD TO SUPREME COURT—Filed July 30,
1948

[fol. 411] Come now the appellants, Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., and George Montgomery, State Tax Collector, etc., in their respective official capacities, in pursuance to Rule 10 of the Supreme Court of the United States, and for the purpose of enabling the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to prepare the record for appeal herein from the decisions of the United States Circuit Court of Appeals for the Fifth Circuit to the Supreme Court of the United States, hereby requests the Clerk to incorporate the portions of the record into the transcript of the record on such appeal, which are hereinafter indicated, to wit:

1. Copy of each transcript of record as filed in the United States Circuit Court of Appeals for the Fifth Circuit under Nos. 12,117, 12,118, 12,119, 12,120, 12,121, 12,122, 12,123, 12,125, 12,126.

2. Printed transcript of record of the United States Circuit Court of Appeals for the Fifth Circuit, No. 12,116 entitled, "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, Appellant vs. DeBardeleben Coal Corporation, Appellee, which was used by the United States Circuit Court of Appeals for the Fifth Circuit as the record in these nine cases, pursuant to the stipulation of counsel and Order of the United States Circuit Court of Appeals.

3. Entry of Argument and Submission of the United States Circuit Court of Appeals for the Fifth Circuit in each of the following numbered cases, Nos. 12,117, 12,118, 12,119, 12,120, 12,121, 12,122, 12,123, 12,125, 12,126.

4. Opinion of the Circuit Court of Appeals for the Fifth Circuit rendered March 5th, 1948.

5. Judgments entered by the United States Circuit Court of Appeals in each of the following numbered cases Nos. 12,117, 12,118, 12,119, 12,120, 12,121, 12,122, 12,123, 12,125, 12,126.

6. Petition for Rehearing filed in the United States Circuit Court of Appeals for the Fifth Circuit in the following numbered cases, Nos. 12,117, 12,118, 12,119, 12,120, 12,121, 12,122, 12,123, 12,125, 12,126.

[fol. 412] 7. Order of the United States Circuit Court of Appeals for the Fifth Circuit dated April 13th, 1948 denying rehearing in the following numbered cases, Nos. 12,117, 12,118, 12,119, 12,120, 12,121, 12,122, 12,123, 12,125, 12,126.

8. Petition for appeal to the Supreme Court of the United States by Lionel G. Ott, Commissioner of Public Finance and ExOfficio City Treasurer, of the City of New Orleans and George Montgomery, State Tax Collector for the Parish of Orleans.

9. Assignment of Errors, filed by appellants with their petition for appeal.

10. Statement as to Jurisdiction filed by appellants with their petition for appeal.

11. Order allowing appeal signed by Mr. Justice Jackson on July 9th, 1948.

12. Citation on appeal.

13. Acknowledgment by counsel for appellees of service of the following:

(a) Copy of the petition for and the order allowing the appeal.

(b) Copy of the assignment of errors.

(c) Statement as to Jurisdiction.

(d) Citation to Appellees.

(e) Statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

14. Bond of appellants on appeal.

15. Statement of appellees opposing jurisdiction and motion to dismiss or affirm.

16. Praeceptum as to record by appellants with acknowledgment of service by counsel for appellees.

Bolivar E. Kemp, Attorney General for the State of Louisiana; Carroll Buck, First Assistant Attorney General; Henry G. McCall, City Attorney for City of New Orleans; (Signed) Henry B. Curtis, First Assistant City Attorney; Alden W. Muller, Assistant City Attorney; Howard W. Lenfant, Special Counsel; (Signed) Henry B. Curtis; (Signed) H. W. Lenfant.

Service acknowledged.

July 30, 1948.

(Signed) Arthur A. Moreno.
Atty. Appellees

[fol. 413] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 414] SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON AND
DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—
Filed August 27, 1948

[fol. 415] Comes now the appellants in the above-entitled causes, and submit the following as their statement of the points upon which they intend to reply in these cases:

1. That Act 59 of 1944 of the Legislature of Louisiana actually fixes the situs in Louisiana of the portion taxed of the watercraft of the three appellee barge lines herein.

2. That there is no prerequisite in said Statute that a taxing situs for this equipment must first be found in Louisiana to enable that State to tax.

3. That all that is required under Louisiana law, to allow Louisiana the right to tax, is the showing that these appellee interstate water carriers operate in Louisiana continually throughout the year; and that such a showing has been indisputably made in these cases.

4. That such taxes have been assessed and collected on a proportionate mileage basis in accordance with Louisiana law.

5. That the Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisiana to collect its share of the taxes on these tow-boats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

6. That the Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

7. That the Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

8. That the Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

9. That the Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of law clause of the 14th Amendment of the Constitution of the United States.

[fol. 416] 10. That the Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.

11. That Act 59 of 1944 of the Legislature of Louisiana is constitutional, is not repugnant to the provisions of the Constitution of the United States, and that Louisiana and its municipalities have the right to their share of ad valorem taxes on the watercraft of these appellee interstate carriers under Louisiana law, as collected in these cases.

And the appellants herein designate the entire record, as filed in this Court to be printed, with the exception that the following be omitted as being unnecessary for the consideration of the points herein relied upon:

1. Transcript of record as filed in the United States Circuit Court of Appeals for the Fifth Circuit under Nos. 12118, 12119 12120, 12121, 12122, 12123 and 12125.

2. The balance of the transcript of record as filed in the United States Circuit Court of Appeals for the Fifth Circuit under No. 12126, except the bill of complaint the answer, therein; said bill of complaint and said answer being herein designated to be printed as being necessary for consideration of the points herein relied upon.

3. From the printed transcript of record of the United States Circuit Court of Appeals for the Fifth Circuit, under No. 12116 entitled, "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer, appellants vs. DeBardeleben Coal Corporation" omit *only* the following:

<i>Description</i>	<i>Page of Said Printed Transcript</i>
COMPLAINT	6, 7, 8, 9, 10.
ANSWER	10, 11, 12.
OPINION	Beginning Paragraph (5) on page 35 and continuing through pages 36, 37, 38, 39, 40, 41 through the first two paragraphs of Page 43.
OPINION	Beginning third paragraph Page 56 through Pages 57, 58, 59, 60, 61, through the second paragraph on page 62 (line 13).
FINDINGS OF FACT	From paragraph numbered 5 (being the third paragraph on page 63) through paragraph numbered 14 on page 64.
CONCLUSIONS OF LAW	Page 66 beginning with paragraph #d 6, (being the third paragraph on page 66) continuing through paragraph 10 at top of page 67. Pages 68, 69.

JUDGMENT**1944 ASSESSMENT****VALUATION SHEET****[fol. 417] TESTIMONY****OF HENRY****DEBARDELEBEN****TESTIMONY OF ALBERT****WADE****TESTIMONY OF E. G.****LOUIS GUEDRY**

Pages 69 and top of page 70.
Beginning second paragraph
page 76 through pages 77, 78,
79, 80, 81, 82, 83, 84, 85, 86, 87.
Beginning second paragraph
on page 87, through pages
88, 89, 90, 91 through first
three paragraphs of page 92.
Beginning fourth paragraph
on page 92 through eight
lines top of page 93.

Appellants designate all other portions of the record, as filed in this Court, as being necessary for such consideration.

Respectfully submitted, Bolivar E. Kemp, Attorney General for the State of Louisiana; Carroll Buck, First Assistant Attorney General; Henry G. McCall, City Attorney for the City of New Orleans; Henry B. Curtis, First Assistant City Attorney; Alden W. Muller, Assistant City Attorney; Howard W. Lenfant, Special Counsel; Counsel for Appellants.

Service of the foregoing Appellants' Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed, on behalf of each of the appellees herein, is acknowledged this 26th day of August, 1948 A. D.

Arthur A. Moreno, Counsel for Appellees.

[fol. 418] [File endorsement omitted.]

[fol. 419] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 11, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 53,246. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 244. Lionel G. Ott, Commissioner of Public Finance and Ex-officio City Treasurer of the City of New Orleans, et al., Appellants, vs. Mississippi Valley Barge Line Company, American Barge Line Company and Union Barge Line Corporation. Filed August 25, 1948. Term No. 244 O. T. 1948.

(9179)

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SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND
EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS,
ET AL.,

Appellants,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

BOLIVAR E. KEMP,
Attorney General of Louisiana;

CARROLL BUCK,
First Assistant Attorney General;

HENRY G. McCALL,
City Attorney for the City of New Orleans;

HENRY B. CURTIS,
First Assistant City Attorney;

AEDEN W. MULLER,
Assistant City Attorney;

HOWARD W. LEXFANT,
Special Counsel;

Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND
EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS,
ET AL., *Appellants,*

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

Now comes Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, Louisiana, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their respective official capacities, appellants herein, and concurrently with the presentation of their petition for the allowance of an appeal from the United States Circuit Court of

Appeals for the Fifth Circuit to the Supreme Court of the United States, herewith and hereby present this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the decrees from which said appeal is taken.

The above named appellants in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above entered nine causes and the decrees of the United States Circuit Court of Appeals, Fifth Circuit, holding the assessment and collection of the taxes by appellants in these nine causes to be illegal and invalid, respectfully represent:

No. 1. Statute Sustaining Jurisdiction

The statutory provision believed to sustain jurisdiction, is Judicial Code Section 240, as amended (title 28 U. S. C. A. Section 347 (b)), and particularly the following provisions thereof:

- (b) "Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

**No. 2. The Louisiana Statute, Provisions of Which Have
Been Nullified and In Effect Held To Be Violative of the
Due Process Clause of the 14th Amendment of the Con-
stitution of the United States**

The Statute of the Legislature of the State of Louisiana, whose provisions, in effect, have been held to violate the due process of law clause of the Constitution of the United States, is Act 59 of 1944 (Dart's Louisiana General Statutes, Vol. 6, Section 8370) and particularly certain provisions of this statute, reading as follows:

(a)

"Movable personal property"—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively, but not exclusively, as the engines, cars and all rolling stocks of railroads; the boats, barges and other water-craft and floating equipment of water transportation lines); but not including "other personal property," as hereinafter defined and expressly excluding the cars and rolling stock of sleeping car and express lines and all similar property and the rolling stock operated upon a per diem basis and such motor vehicles as are exempted by law from such taxation and the cars of private transportation and tank car lines, the valuation and assessment of which are covered and provided for by other laws.

.

(f) The "movable personal property" of such persons, firms, or corporations, whose line, route, or system is partly within this state and partly within another state or states, shall be by the commission valued for the purposes of taxation and by it assessed; and such assessment by it fairly divided, allocated and certified

to each such parish and municipality as herein defined, within this state, within, through or under which same be operated; said division, allocation and certification to be determined in the following manner and according to the following method, such assessment to be there subject to all state taxes and to all parish taxes and to all municipal taxes, as same are herein defined and to none other.

1. The portion of all of such property, of such person, firm or corporation shall be assessed in the state of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation.

5.

(g) For the purposes of such valuation, assessment and taxation in Louisiana such parishes and municipalities shall be hereby and declared, respectively, *to be a taxable situs in this state* of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a *resident or a non-resident* of Louisiana and *irrespective of whether or not here domiciled locally or otherwise.* (Italics ours.)

No. 3. Date of Decrees and Application for Appeal

Decrees of the foresaid United States Circuit Court of Appeals holding the collection of these *ad valorem* taxes on the tow-boats and barges of the respondent barge line Companies, ~~to be illegal and invalid~~ were entered as of March 5th, 1948, rehearing denied April 13, 1948, the application for appeal herein is presented July 9th, 1948.

No. 4 Nature of the Cases, the Rulings of the Court and Substantial Questions Involved

The above nine cases were consolidated for trial and involve the assessment and collection by appellants herein of *ad valorem* taxes against the tow boats and barges of the three respondent barge line Companies in the ratio of the number of miles of their lines within Louisiana bears to the total number of miles of their entire lines, in accordance with the Louisiana Statute.

The respondent barge line Companies filed suit for the recovery of these taxes paid under protest, the District Court holding that the water craft of these three barge lines had no taxing situs in Louisiana, and decreeing the retention of these taxes by appellants to violate the due process of law clause of the 14th Amendment of the Constitution of the United States; the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in these nine cases. This holding by the District Court and affirmed by the Circuit Court of Appeals, is in direct conflict with Section 5 (g) of the Louisiana Statute (Act 59 of 1944), which specifically fixes the taxable situs of the portion sought to be taxed to be in the Parish or municipality where these barge lines operate within Louisiana, regardless of whether these Companies be a *resident* or *nonresident* of Louisiana and *irrespective of whether or not domiciled in Louisiana or otherwise*.

The question involved here is whether or not a taxable situs of these interstate carriers should be an issue when the Louisiana Statute specifically provides for the collection of a portion of these taxes, regardless of the residence or domicile of the barge line Companies.

In spite of the fact that the only condition precedent to allow Louisiana and the City of New Orleans the right to a proportion of these taxes under the State Statute, is the

fact that the lines of these Companies run partly within Louisiana (which is of course admitted) the District Court and the Circuit Court of Appeals have gone into the question of the situs of this watercraft, and in not allowing New Orleans and Louisiana the right to these taxes under the clear wording of the State Statute have in effect declared these provisions of this Statute of the State of Louisiana repugnant to the Constitution of the United States, which is the Federal question presented here.

Act 59 of 1944 of the Legislature of Louisiana contains no proviso that a taxing situs must first be found in Louisiana for these interstate carriers, but the Statute actually makes the parish or municipality in Louisiana in which they operate the taxable situs for the portion sought to be taxed.

The holding by the District Court and the Circuit Court of Appeals therefore in effect decrees this Statute repugnant to the Constitution of the United States and calls for an *appeal of right* under the above cited Section of the Judicial Code of the United States.

The Federal question involved here is substantial as it affects the very life of the Louisiana Statute, and will be determinative of many other pending cases.

The appellants append hereto a copy of the opinion of the United States District Court delivered in these cases, together with the Court's findings of fact and conclusions of Law; the appellants also append hereto a copy of the opinion

of the United States Circuit Court of Appeals for the Fifth
Circuit.

Respectfully submitted,

BOLIVAR E. KEMP,
Attorney General for the State of Louisiana;

CARROLL BUCK,
First Assistant Attorney General;

HENRY G. McCALL,
City Attorney for the City of New Orleans;

HENRY B. CURTIS,
First Assistant City Attorney;

ALDEN W. MULLER,
Assistant City Attorney;

HOWARD W. LENFANT,
Special Counsel.

APPENDIX "A"

[fol. 149] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 149a] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1948

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

On this day this cause was called, and, after argument by H. W. Lenfant, Esq., for appellant, and Arthur A. Moreno, Esq., for appellee, was submitted to the Court.

[fol. 150] OPINION OF THE COURT—Filed March 5, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

No. 12117

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12118

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12119

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

[fol. 151]

No. 12120

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12121

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

AMERICAN BARGE LINE COMPANY, Appellee

No. 12122

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12123

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

UNION BARGE LINE CORPORATION, Appellee

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and Ex-
Officio City Treasurer, etc., Appellant,

versus

DEBARDELEBEN COAL CORPORATION, Appellee

[fol. 152]

No. 12125

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

VERSUS

MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee

No. 12126

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant,

VERSUS

AMERICAN BARGE LINE COMPANY, Appellee

Appeals from the District Court of the United States for
the Eastern District of Louisiana

(March 5, 1948)

Before Hutcheson, McCord, and Lee, Circuit Judges

LEE, Circuit Judge:

These suits were brought by appellees for the return of *ad valorem* taxes assessed and collected by the City of New Orleans and the State of Louisiana. They were consolidated for the purpose of trial as they are for the purpose of appeal.¹

[fol. 153] The four appellees, Mississippi Valley Barge Line Co. (hereinafter called "Mississippi"), American Barge Line Co. ("American"), Union Barge Line Corporation ("Union"), and DeBardeleben Coal Corporation ("DeBardeleben"), as their names imply, operate barge lines. Mississippi, American, and DeBardeleben sued for return of taxes collected for the years 1944 and 1945, while

¹ The taxes were paid under protest under the terms of Act 330 of 1938, which provides that in case any taxpayer resists the payment of the amount assessed against him or the enforcement of any provision of law in relation thereto, the amount shall be paid by the taxpayer but kept segregated; a right of action is given the taxpayer to contest in any State or federal court having jurisdiction the invalidity he insists upon, and, if he prevail, the taxes paid shall be returned with interest.

Union sued for return of taxes collected for the year 1945.² The taxes were levied under assessments made by the Louisiana Tax Commission under Act 152 of 1932, as amended by Act 59 of 1944, on the proportion of appellees' lines in Louisiana as compared to their entire systems. Appellees' petitions all follow the same general trend, that the tax is unconstitutional because it is a burden upon interstate commerce, because it violates the due-process clause of the State and federal Constitutions, and further that the assessments were arbitrary and capricious. Appellants contend that the taxes were constitutional and proper, and further that the question of assessments, that is, the method of making them and the amount thereof, is not now before the court, since appellees did not avail themselves of the administrative remedies given them by the Louisiana law. The trial below resulted in judgments for each of the appellees, ordering the return of the taxes paid, the court holding that in the cases of Mississippi, American, and Union, the retention of the taxes by appellants constituted the taking of property without due process of law in violation of [fol. 154] the federal and State Constitutions and holding in the case of DeBardeleben that, while Louisiana had the right to tax such of its property as had a tax situs in Louisiana, the assessment on the proportionate rule basis as made was illegal, null, and void. From the eleven judgments in favor of appellees, both appellants have appealed.

The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there.

The record shows that each of the appellees is a corporation chartered under the laws of States other than Louisiana. American, Mississippi, and DeBardeleben are Delaware corporations, and Union is a Pennsylvania corporation. None of the watercraft of American, DeBardeleben,

² Mississippi Valley Barge Line Co. and American Barge Line Co. each are plaintiffs in two suits against the Commissioner of Public Finance for the City of New Orleans and in two suits against the State Tax Collector for the City of New Orleans. The DeBardeleben Coal Corp. is plaintiff in two suits against the Commissioner of Finance for the City of New Orleans, and the Union Barge Line Corp. is plaintiff in one suit against that Commissioner.

or Mississippi was ever physically within the State of Delaware, but some, if not all, of the taxed property of Union was present during the tax year within the State of Pennsylvania. American and Mississippi maintain offices in New Orleans, though their principal business offices are in Louisville and St. Louis, respectively. Union merely employs an agent in New Orleans for the conduct of its business; its principal office is in Pittsburgh. The principal office of the Marine Division of DeBardeleben is in New Orleans; its official home office is in Birmingham, Ala. Each of the four corporations is engaged in transportation of freight upon inland waterways of the United States under authority of a Certificate of Public Necessity and Convenience issued by the Interstate Commerce Commission. [fol. 155] The taxed towboats of American and DeBardeleben are enrolled under United States Shipping Regulations pertaining to vessels engaged in domestic commerce (Title 46, c. 12, U. S. C. A.), at Wilmington, Del.; and there, too, they have registered their barges. The towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi are enrolled at St. Louis. Under neither Delaware nor Pennsylvania law is the marine equipment of the appellees subject to State taxation.

DeBardeleben operates from New Orleans to Houston, Galveston, and Corpus Christi, in Texas; in Alabama, as far as Mobile; in Florida, to Pensacola, Panama City, and Carrabelle; and in the tax years in question its watercraft made occasional trips up the Mississippi to points north of the Louisiana boundary. The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. These turn-arounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered by the interstate commerce operations in 1943, American's towboats spent about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spent about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944,

[fol. 156] Union's towboats spent about 2.2% and its barges about 4.3%. Appellees' watercraft, while in the port of New Orleans have the benefit of such fire protection as is afforded all craft moored to the wharves, and of harbor police surveillance, and of all sanitary regulations of the State and City Boards of Health.

DeBardeleben was merged or consolidated in 1937 with W. G. Coyle, Inc., a Louisiana corporation which had operated a Marine Terminal and harbor traffic business within the port of New Orleans. To Coyle's operations in 1934 had been added a common carrier water transportation business, mainly in the Gulf Intracoastal Waterways, running westerly as well as easterly from the port of New Orleans. After the merger in 1937, the Coyle operations were conducted as the Marine Division of DeBardeleben, without interruption or material change, under the name of Coyle Lines. The main office of the Marine Division of DeBardeleben, from which it controlled and carried on continuously all of the Coyle Line operations, was located in New Orleans, and so also was the machine and repair shop, maintained for upkeep and repair of its watercraft. At the New Orleans office the crews of the tows were regularly paid their wages, and to it the employees reported at the customary taking of the usual 24-hour lay-off at the end of each 6-day work period called for under the union labor contract. At the Coyle New Orleans Terminal, the tugs operated by Coyle Lines were usually fueled, and there, too, as a rule, were made all scheduled general repairs or minor voyage repairs needed by the Marine Division watercraft. None of the Coyle Lines watercraft ever permanently left [fol. 157] the original situs in Louisiana except eight barges especially assigned wholly to hauling company coal on the Warrior River in Alabama.

The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans. With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tug-

boats and barges having a tax situs there could be taxed by the City of New Orleans. But the court further found that in assessing the tugboats and barges there had been included in the assessment the eight barges permanently located in Alabama, and that such fact made the city tax against De-Bardeleben illegal, null, and void. The correctness of these rulings with respect to the several companies is the sole question before us.

The Louisiana statutes under which the State and the City of New Orleans taxed the tugboats and barges of appellees are set out in a footnote.³

³ Act 152 of 1932 provides:

"... the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State, or States, or whose sleeping cars run over any line lying partly within this State or partly within another State or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines."

Act 152 of 1932 was amended by Act 59 of 1944. It provides:

"'Movable Personal Property'—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusively, as the engines, cars and all rolling stock of railroads; the boats, barges and other water craft and floating equipment of water transportation lines); ...

"(f) The 'movable personal property' of such persons, firms, or corporations, whose line, route, or system is partly within this State and partly within another state or states, shall be by the Commission valued for the purposes of taxation and by it assessed; ...

"1. The portion of all of such property of such person, firm or corporation shall be assessed in the State of Louisi-

Appellants contend that for the watercraft of American, Mississippi, and Union, New Orleans is the terminus into and out of which those lines haul the greater part of the freight handled by them; that the watercraft were loading and unloading in New Orleans throughout the tax years; and that in fact they were within the State of Louisiana more than in any other State. Appellants insist that under the doctrine of *Pullman's Palace Car Co. v. Penna.*, 141 U. S. 18, Louisiana has the right to tax the craft in question, upon the theory that they have an average continuous presence in Louisiana, the basis of assessment of each appellee being the ratio between the total number of miles of appellee's line in Louisiana and the total number of miles of the entire line. With respect to DeBardeleben, appellants contend that New Orleans, being the home port of its watercraft, was also its permanent tax situs; and that the failure and refusal of that corporation to give the information asked for or to make any assessment return for the tax years involved estopped it to contest the correctness of the assessment made against it. Each of the [fol. 159] appellees asserts that, the State of its domicile being elsewhere, it is liable to assessment in Louisiana only upon a showing that the watercraft had a permanent situs within the State during the tax years; and that no such showing was made. DeBardeleben further asserts that the lower court was right in setting aside the assessment made against it upon finding that the value of eight barges in Alabama had been included in the total value from which the local assessments were made.

As stated, the City of New Orleans and the State of Louisiana rely chiefly upon *Pullman's Palace Car Co. v. Penna.*, *supra*, as authority for the assessment against appellees. In that case the Supreme Court held that where tangible personal property such as freight and passenger cars are used daily by a railroad over fixed routes in interstate commerce, a State through which the railroad operates although not the State of its domicile may tax such tangible property upon the basis of the ratio between the

ana, wheresoever, in the ratio which the number of miles of the line, within the State bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation."

mileage within the State and the total mileage of the railroad system. But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways. Under the decisions the regular or irregular stops at ports in nondomiciliary States of watercraft moving in interstate commerce do not establish tax situs in such States, and such watercraft remain taxable only by the State of the owner's domicile. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Ayer & Lord Tie Co. v. Kentucky*, 202 [fol. 460] U. S. 409; *So. Pacific Co. v. Kentucky*, 222 U. S. 63; cf. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292. Neither enrollment of a vessel at a particular port, even though the vessel makes regular calls at the port of enrollment, *St. Louis v. Wiggins Ferry Co.*, *supra*; *Ayer & Lord Tie Co. v. Kentucky*, *supra* nor benefits received at a port, such as fire protection and wharves for loading and unloading accorded to every vessel, of themselves confer the power to tax upon the State of the port. *Hays v. Pacific Mail S. S. Co.*, *supra*; *So. Pacific Co. v. Kentucky*, *supra*.

The fact that none of the watercraft owned by American, Mississippi, and DeBardeleben has been within the State of Delaware, the State of the owners' domicile, does not of itself control the right of that State to tax the property. Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries. *So. Pacific Co. v. Kentucky*, *supra*. That no tax has been assessed by the State of the owner's domicile has no bearing upon the right of another State to tax. It is only when the tangible personal property has acquired a tax situs within a State other than the owner's domicile that it may be taxed there. *Brown v. Houston*, 114 U. S. 622; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299.

Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American, and Union acquired no tax situs in Louisiana, and [fol. 161] that no tax could be legally assessed and collected by that State or by the City of New Orleans. We are also of the opinion that the Court below was correct in holding that the tugboats and barges of DeBardeleben, except the

eight barges in Alabama, had acquired a tax situs in Louisiana. New Orleans clearly was the home port of DeBardeleben's watercraft. Its watercraft, except the eight barges in Alabama, were properly taxed there. The fact that the amount assessed against DeBardeleben was arrived at by including the value of the eight barges in Alabama is not ground for declaring the assessment against that company void. The taxpayer was called upon to furnish information and make its rendition for each of the tax years. Taking the position that it owed no tax, it refused to furnish any information and thus forced the taxing authority to get its information as best it could. Under the local law, if the taxpayer does not make a return, the taxing authority "shall himself fill out said list from the best information he can obtain." The DeBardeleben Coal Corporation was assessed 25% of the value of its tugs and barges. It urges that this was an excessive assessment, arbitrarily made without information either as to the miles it operated within the State in carrying on its business or as to the value of its properties. The evidence indicates that the taxing authority had little information upon which to act and that the assessments were made from estimates based on meagre and uncertain data. This was due in a large measure to DeBardeleben's refusal to furnish requested information. Instead of acting arbitrarily, the taxing authority obviously made the assessments from the best information it could obtain.

[fol. 162] The City of New Orleans has pleaded that the taxpayer, under Act 39 of 1922, is estopped to contest the correctness of the assessments because of its failure to make tax renditions on or before June 1 of the tax years. Construing a similar Act, the Supreme Court of Louisiana has held that the estoppel is not applicable where, as here, taxpayer's failure to file a rendition was based on the honest belief that its property was not taxable. *Travelers' Insurance Co. v. Board of Assessors, et al.*, 122 La. 129, 47 So. 439, 441, citing *Central of Georgia Ry. v. Wright*, 207 U. S. 127.

In decreeing the assessments against DeBardeleben void, the court below erred. The erroneous inclusion of property in an assessment is ground for reduction, not cancellation. *Griggsby Construction Co. v. Freeman*, 108 La. 435, 32 So. 399. The DeBardeleben suits in effect are suits for can-

cancellation, not reduction of the assessments, and, though under Louisiana practice reduction, in the absence of an alternative plea therefor, may not be decreed in a suit for cancellation, *Fidelity Mutual Life Insurance Co. v. Fitzpatrick*, 125 La. 976, 52 So. 118, 120, a more liberal rule is followed in the federal courts Under Rule 54 (c), Federal Rules of Civil Procedure, relief to which a taxpayer is entitled may be granted even though not demanded. The DeBardeleben suits will, therefore, be remanded in order that the court below may ascertain from the present record, or that record supplemented by additional evidence, whether DeBardeleben has paid excess taxes for the ~~tax~~ years, and, if it has, under Act 330 of 1938, order a refund of the excess paid, with interest.

[fol. 163] The judgments appealed from are affirmed in all these causes except No. 12,116 and No. 12,124; in those two causes the judgments appealed from are reversed, and the causes are remanded for further proceedings not inconsistent with this opinion.

[fol. 164]

JUDGMENT

Extract from the Minutes of March 5, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.

VERSUS

DEBARDELEBEN COAL CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, DeBardeleben Coal Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol 164a]

JUDGMENT

Extract from the Minutes of March 5, 1948

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, DeBardeleben Coal Corporation, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 165] ORDER EXTENDING TIME TO FILE PETITION FOR
REHEARING

Extract from the Minutes of March 22, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is hereby ordered that DeBardeleben Coal Corporation, appellee herein be, and it is hereby granted until April 5, 1948, for the purpose of filing an application for rehearing herein and a written brief in support thereof.

Shreveport, La., this 22 day of March, 1948.

(Signed) Elmo P. Lee, U. S. Circuit Judge.

[fol. 165a] ORDER EXTENDING TIME TO FILE PETITION FOR
REHEARING

Extract from the Minutes of March 22, 1948

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is hereby ordered that DeBardeleben Coal Corporation,
appellee herein be, and it is hereby granted until April 5,
1948, for the purpose of filing an application for rehearing
herein and a written brief in support thereof.

Shreveport, La., this 22 day of March, 1948.

(Signed) Elmo P. Lee, U. S. Circuit Judge.

[fol. 170]

ORDER DENYING REHEARINGS

Extract From the Minutes of April 13, 1948

No. 12116

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

No. 12124

LIONEL G. OTT, Commissioner of Public Finance and
Ex-Officio City Treasurer, etc.,

versus

DEBARDELEBEN COAL CORPORATION

It is ordered by the Court that the petitions for rehearing
filed in these causes be, and they are hereby denied.

Clerk's Certificate to foregoing transcript omitted in
printing.

(6418)

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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 194...

Nos.

244

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
Appellant, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. MISSISSIPPI VALLEY
BARGE LINE COMPANY, Appellee.

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
Appellant, vs. AMERICAN BARGE LINE COMPANY, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. AMERICAN BARGE
LINE COMPANY, Appellee.

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
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LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc.,
Appellants, vs. UNION BARGE LINE CORPORATION, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. MISSISSIPPI VALLEY
BARGE LINE COMPANY, Appellee.

GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. AMERICAN BARGE
LINE COMPANY, Appellee.

(CONSOLIDATED)

Appeal from the United States Circuit Court of Appeals for the
Fifth Circuit.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF
APPELLEES TO DISMISS OR AFFIRM.

BOLIVAR E. KEMP,

Attorney General for the State of Louisiana.

CARROLL BUCK,

First Assistant Attorney General.

HENRY G. McCALL,

City Attorney for City of New Orleans.

HENRY B. CURTIS,

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HOWARD W. LENFANT,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 194 .

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**GEORGE MONTGOMERY, State Tax Collector, etc., Appellant, vs. AMERICAN BARGE
LINE COMPANY, Appellee.**

(CONSOLIDATED)

**Appeal from the United States Circuit Court of Appeals for the
Fifth Circuit.**

**BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF
APPELLEES TO DISMISS OR AFFIRM.**

MAY IT PLEASE THE COURT:

Appellants take serious issue with the statement of appellees herein that the questions raised by this appeal lack substance, and on the contrary, appellants show that they are entitled to an appeal as a matter of right, in the serious and important questions raised here, as the very life of a Louisiana Statute is at stake!

Appellants invoke the jurisdiction of this Court under Section 240 of the Judicial Code, as amended, (28 U. S. C. A. Section 347) reading in part as follows:

(b) "Any case in a circuit court of appeals where is drawn in question the validity of a **Statute of any State**, on the ground of its being **repugnant** to the **Constitution**, treaties or laws of the United States, and the **decision is against its validity**, may at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case." (Emphasis supplied.)

Appellants show that the question presented herein falls squarely within the foregoing quoted provisions and calls for an appeal as a matter of right.

The three appellee Companies herein, in their complaints, attacked the constitutionality of the Louisiana Statute (Act 59 of 1944) under which the taxes on this watercraft were imposed, as being in violation of the provisions of the Constitution of the United States. The United States District Court in its conclusions of law held:

"The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions."

The taxes of course were levied under the provisions of the Louisiana Statute, giving the State of Louisiana the right to taxes on this watercraft, and this holding by the United States District Court expressly sets forth that the Statute is repugnant to the Constitution of the United States.

These cases were all consolidated for trial in both the District Court and the United States Circuit Court of Appeals, the Court of Appeals affirming the decision of the District Court, as to the three appellees herein, when in the conclusion of its opinion the Court states: "The judgments appealed from are affirmed in all these causes"

Thus, it is inescapable that the Circuit Court of Appeals, in effect, held with the District Court that the provisions of the Louisiana Statute are repugnant to the Constitution of the United States; the decision being **against the validity of the State Statute.**

It is self-evident, therefore, that these nine cases come clearly within the provisions of paragraph "(b)" of Section 240 of the Judicial Code, as amended (28 U. S. C. A. Section 347) (*supra*).

Obviously, then, appellants are entitled to an appeal herein as a matter of right.

Appellants have no quarrel with the statement of appellees that a decision of a Circuit Court of Appeals merely applying a State law is not reviewable by appeal to the Supreme Court, nor with the cases cited in support thereof. We believe this principle of law to be well settled, but to have absolutely no application here. Had

the Circuit Court of Appeals **applied** the State law here, it would have resulted in **judgment** for the **appellants** instead of the appellees; instead the Circuit Court of Appeals, in effect, held the State Statute repugnant to the Constitution of the United States. The statute in question (Act 59 of 1944 of the Legislature of Louisiana) specifically sets forth that interstate carriers, such as appellees herein, who run their lines within Louisiana, shall be assessed on a proportionate mileage basis, Section 5, Paragraph "g" of said Statute reading as follows:

(g) "For the purposes of such valuation, assessment and taxation in Louisiana, such parishes and municipalities shall be hereby fixed and declared, respectively, **to be a taxable situs in this state** of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a **resident or a non-resident** of Louisiana and **irrespective of whether or not here domiciled locally or otherwise.**" (Emphasis supplied.)

Thus, it is clearly seen, that had the Circuit Court of Appeals applied the State Statute they would have necessarily found for appellants herein; they could not have done otherwise. It will be noted that there is no provision whatsoever in the Statute in question which allows for a Court to first **find** that the barges and tow-boats have a taxing situs in Louisiana. If such a condition precedent had been contained in the Statute, then appellees' position here may have been on a more sound basis. The Statute unequivocally **fixes** the taxing situs in Louisiana for the portion of the property sought to be taxed, whether the said tax payer be a resident or a

non-resident of Louisiana and irrespective of here domiciled locally or otherwise.

The three appellee corporations herein are domiciled in other States than Louisiana and it is such corporations the Statute is intended to cover. Obviously, Louisiana needed no special Statute, as this one, to cover watercraft found to have a taxing situs in the State, as such equipment could be taxed under the general taxing laws of the State, the same as domestic property.

This Statute fixes the situs in Louisiana of a portion of appellees' property. To therefore hold that this property has no taxing situs in Louisiana is to deny the validity of the Statute!

It is admitted that these private barge-lines run continually and constantly throughout the year in Louisiana, and they clearly come within the provisions of this Statute; to hold that Louisiana cannot collect these taxes is to decide against the validity of a State Statute. This is so apparent from the reading of the Statute, and the provisions of the Judicial Code giving this Court jurisdiction, that it should admit of no further argument.

It is true that the Circuit Court of Appeals went beyond the provisions of the Statute and, contrary to the provisions of the Statute, attempted to find that this watercraft equipment had no taxing situs in Louisiana, in spite of the fact that the Statute clearly fixes a taxing situs in Louisiana for a proportion of this watercraft. The Circuit Court of Appeals clearly abrogated the provisions of the Statute and necessarily and inescapably held against its validity.

These decisions therefore give appellants a clear right of appeal under the law.

There are so many other similar, untried pending cases awaiting a final decision herein, involving many, many thousands of dollars, that such a serious Federal question calls for decision by the highest Court of our land, and which compels appellants to apply for this appeal, under the law.

It is therefore respectfully urged that appellees' motion to dismiss or affirm be denied, and that the appeal be set for hearing on the merits.

Respectfully submitted,

BOLIVAR E. KEMP,
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Special Counsel,
Counsel for Appellants.

This is to certify that copies of this Brief have been served on opposing counsel on this the day of August, 1948.

.....

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 244

**LIONEL G. OTT, Commissioner of Public Finance and
Ex-officio City Treasurer of the City of New Orleans,
Et Al.,**

Appellants,

versus

**MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION.**

**Appeal from the United States Circuit Court of Appeals
for the Fifth Circuit.**

ORIGINAL BRIEF ON BEHALF OF APPELLANTS.

BOLIVAR E. KEMP,

Attorney General of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

*City Attorney for the City of
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HENRY B. CURTIS,

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**SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948.**

No. 244.

**LIONEL G. OTT, Commissioner of Public Finance and
Ex-officio City Treasurer of the City of New Orleans,
Et Al.,**

Appellants,

versus

**MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION.**

**Appeal from the United States Circuit Court of Appeals
for the Fifth Circuit.**

ORIGINAL BRIEF ON BEHALF OF APPELLANTS.

MAY IT PLEASE THE COURT:

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked on the grounds
that a State Statute has, in effect, been held repugnant to

the Constitution of the United States by a United States Circuit Court of Appeals.

This judgment gives rise to an appeal to this court under the Judicial Code, Section 240, as amended (Title 28, U. S. C. A., Section 347 (b)), the pertinent provisions thereof reading as follows:

(b) "Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

The State Statute in question is Act 59 of 1944 of the Legislature of Louisiana (Dart's La. General Statutes, Vol. 6, Section 8370) and particularly certain provisions of this statute, reading as follows:

(a) * * *

"Movable personal property"—All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively, but not exclusively, as the engines, cars and all rolling stocks of railroads; the boats, barges and other water-craft and floating equipment of water

transportation lines); but not including "other personal property," as hereinafter defined and expressly excluding the cars and rolling stock of sleeping car and express lines and all similar property and the rolling stock operated upon a per diem basis and such motor vehicles as are exempted by law from such taxation and the cars of private transportation and tank car lines, the valuation and assessment of which are covered and provided for by other laws.

* * * * *

(f) The "movable personal property" of such persons, firms, or corporations, whose line, route, or system is partly within this state and partly within another state or states, shall be by the commission valued for the purposes of taxation and by it assessed; and such assessment by it fairly divided, allocated and certified to each such parish and municipality as herein defined, within this state, within, through or under which same be operated; said division, allocation and certification to be determined in the following manner and according to the following method, such assessment to be there subject to all state taxes and to all parish taxes and to all municipal taxes, as same are herein defined and to none other.

1. The portion of all of such property, of such person, firm or corporation shall be assessed in the state of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation.

* * * * *

(g) For the purposes of such valuation, assessment and taxation in Louisiana such parishes and municipalities shall be hereby and declared, respectively, *to be a taxable situs in this state of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a resident or a non-resident of Louisiana and irrespective of whether or not here domiciled locally or otherwise.* (Italics ours.).

Appellees may seek to tell this Court that this Statute has not been held repugnant to the Constitution, but has rather been applied by the Courts below.

Suffice to say, we need only to quote the language of the opinion of the United States District Court as affirmed by the Circuit Court of Appeals to prove the fallacy of this argument. The District Court, in its conclusions of law (R. P. 57) stated:

"The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions."

The United States Circuit Court of Appeals for the Fifth Circuit, in its opinion, (R. P. 114), states:

"The judgments appealed from are affirmed in all these causes * * *"

The taxes were levied under Act 152 of 1932, as amended by Act 59 of 1944. Nothing could be plainer than the

language of the lower Courts in holding this Statute to violate the provisions of the Constitution.

Beyond this, if the lower Courts had applied the Statute, they would have **had** to hold for appellants, for the Statute provides **the situs in Louisiana** for the proportion taxed.

Thus, it is unescapable that this Court has jurisdiction under the unmistakable wording of the Judicial Code, Section 240, (b) (*supra*), calling for an appeal to this Court, as a matter of right!

The Federal question presented here is whether or not this Louisiana Statute violates the due process of law clause, or the commerce clause of the Constitution of the United States—such Federal question is extremely substantial and highly important—it affects the very life of **this Louisiana Statute**, and involves many other pending cases and hundreds of thousands of dollars in needed tax money.

The jurisdiction of this Court therefore is clearly apparent.

STATEMENT OF THE CASE.

Involved in this appeal are nine different suits. These cases were all consolidated for trial and argument in the District Court with separate judgments being rendered. They were likewise consolidated on appeal to the United States Circuit Court of Appeals for the Fifth Circuit—they are now before this Court in one appeal on a consolidated record.

While there are nine suits considered here, there are but three different plaintiffs and but two defendants—the Mississippi Valley Barge Line Company being plaintiff in two cases against the Commissioner of Public Finance for the City of New Orleans, and in two cases against the State Tax Collector for the City of New Orleans—the American Barge Line Company being plaintiff in two cases against the Commissioner of Finance for the City of New Orleans, and in two cases against the State Tax Collector for the City of New Orleans—the Union Barge Line Corporation being plaintiff in one suit against the Commissioner of Public Finance for the City of New Orleans.

The suits of the Mississippi Valley Barge Line Company and the American Barge Line Company are for the return of ad valorem taxes assessed on their watercraft and collected for the years 1944 and 1945, while the suit of the Union Barge Line Corporation is for the return of 1945 taxes assessed and collected by the City of New Orleans.

The record shows that the Mississippi Valley Barge Line Company and the American Barge Line Company are Delaware Corporations—but do no business in Delaware—that State being simply the resting place for their charters; and that the Union Barge Line Corporation is a Pennsylvania Corporation, doing some business in Pennsylvania.

The record further shows that none of the watercraft of Mississippi Valley and American was ever physically within the State of Delaware, but some, if not all, of the

watercraft of Union was present during the tax year within the State of Pennsylvania.

As the names imply, each of these appellees operate barge lines, being engaged in the transportation of freight by waterway, their barges and towboats operating on the Mississippi River and some of its tributaries to the City of New Orleans and the State of Louisiana, appellants assessing this tax on the proportionate rule basis, that is, assessing but a part of the valuation, for the portion of their lines in Louisiana, as compared to their whole system, in accord with Act 152 of 1932, as amended by Act 59 of 1944 (*Dart's Statutes*, Sec. 8370) of the Legislature of the State of Louisiana.

These taxes were paid under protest and segregated by the appellants in accordance with Act 330 of 1938 of the legislature of the State of Louisiana, pending the final disposition of these cases.

The appellees claim that the City of New Orleans and the State of Louisiana have no constitutional right to collect this type of tax, whereas, both appellants maintain that these taxes are constitutional, legal and proper.

Appellees' petitions all follow the same general trend, that the tax is unconstitutional because it is a burden upon interstate commerce; because it violates the due process clause of the Constitution; and further, that the assessments were arbitrary and capricious.

Appellants deny that these taxes imposed an undue and unconstitutional burden on interstate commerce, deny

that they violate any due process clause of the Constitution, and allege that the only reasons that assessments were made in the manner in which they were made is because the appellees arbitrarily withheld the information requested by the Louisiana Tax Commission, leaving that Commission no other alternative but to make the assessments in the manner in which they were made. Appellants further set forth that the assessments were properly and legally made.

Appellants further contend that the question of the assessments, i. e., the method of making them and the amount thereof are not now before this Court for the reason that appellees did not avail themselves of the remedies given them by the Louisiana laws to question the amount or the method of the assessment, all of which is fully set forth in the laws of Louisiana, and which is known or should have been known to plaintiffs and their counsel.

The trial in the District Court resulted in judgment for each of these appellees, ordering the return of the taxes paid; the Court holding that in each of the cases at bar retention of these taxes by appellants constituted a taking of property without due process of law, in violation of the Federal Constitution for the reason that the property sought to be taxed had no situs in Louisiana.

The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court in these nine cases, applying the principles in the old vessel taxation cases to the issue involved here, holding, in effect, that the

Louisiana Statute violates the due process of law clause of the Constitution of the United States.

An appeal was granted to appellants by this Honorable Court under Section 240 (b) *supra* of the Judicial Code (R. p. 130) and probable jurisdiction was noted (R. p. 136). These cases are now before the Court on this appeal.

SPECIFICATION OF THE ASSIGNED ERRORS URGED.

I.

THE CIRCUIT COURT OF APPEALS, AS WELL AS THE DISTRICT COURT, FELL INTO GRIEVOUS ERROR IN APPLYING THE PRINCIPLES IN THE OLD VESSEL TAXATION CASES TO THE ISSUES PRESENTED HERE, WHEN THERE IS NO FACTUAL NOR CONSTITUTIONAL BASIS FOR SO DOING, AND THEREFORE INCORRECTLY APPLIED THE LAW OF SITUS IN THESE CASES.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT APPLYING THE PROPORTIONATE RULE OF TAXATION AS TO MILEAGE IN THESE CASES, AS CALLED FOR IN THE LOUISIANA STATUTE.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN NULLIFYING THE CLEAR PROVISIONS OF THE LOUISIANA STATUTE AND IN EFFECT HOLDING THAT THESE PROVISIONS OF THE LOUISIANA STATUTE VIOLATE THE DUE-PROCESS-OF-LAW CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

At the outset, we might mention that all of the facts relating to the movement of all of this watercraft, were adduced from appellees' witnesses and records, as appellants had no access to this information. Yet from appellees' own evidence, the transcript is replete with clear and concise facts to show that each of these barge line companies do a tremendous, regular, yearly business in and out of New Orleans, with the result that if not the major, then a very substantial part of their business is done through that Port; in any event, more than is done in any other one port or State.

While the issue here, of course, is not a tax on the business done, yet of necessity this evidence clearly establishes the fact that the barges and tow-boats were in New Orleans and Louisiana so constantly, so regularly, and so permanently, as to give this State an actual situs of an average portion thereof for the purpose of this ad valorem tax.

The facts; therefore, are not in dispute here.

We ask only that the Court apply these facts to the issues.

Let us, briefly, therefore, point out the pertinent facts as related to each appellee:

The Facts as to the AMERICAN BARGE LINE COMPANY.

The boats of this Company operate between Pittsburgh, Pa., and **New Orleans, La.**, and make an occasional trip from St. Louis to **New Orleans**; their boats ply mostly on the Mississippi and Ohio Rivers; **their tows end in New Orleans**; some of their barges may go on to Texas with another Line's towboats or the tugs in New Orleans deliver them to local docks; the American's towboats then pick up another tow to go North. (R. pp. 59, 60.)

Their barges are unloaded in New Orleans by the Mississippi Valley Barge Line Company (R. p. 60.)

Their barges operate beyond New Orleans in connection with the River Terminals Corporation and the "Coyle Lines" (DeBardleben Coal Corporation); barges going into the Intracoastal Canal are distributed by "Coyle" tugs; they work a small crew of men off and on in New Orleans to clean out their barges.

They maintain an office in the Maison Blanche Building in New Orleans. (R. p. 60.)

The American's boats are turned around as fast as possible in **every** port; their boats take on supplies in New Orleans and their towboats sometimes wait in New Orleans for barges coming across the Intracoastal Canal; they had 47 tows to New Orleans in 1943 and 73 tows to New Orleans in 1944; they were in and out of New Orleans **about once a week** and in 1944 they averaged **better than that**; New Orleans is the terminus of their lines. (R. p. 61.) Their towboats and barges stop in New Orleans and after the necessities of delay of days to make up the tow going northward, then proceed up the river. (R. p. 61.) (Emphasis ours.)

From these facts it is obvious the American Barge Line Company had some of its watercraft in New Orleans constantly, or every day in the year. Not necessarily the same towboat or barges, but some of their fleet was here at all times, as part of their system of operations; they had an **average** number of their towboats and barges here **at all times**. Consider how their tows arrived in New Orleans once a week or oftener—how their barges had to be left here for unloading or distribution (which necessarily takes several days)—how other of their barges were continually coming across the Intracoastal Canal to New Orleans, to be taken North—how some barges, when unloaded in New Orleans had to be reloaded in New Orleans—all part of an integrated system. It is therefore apparent that not for one minute

of one day of one year was all of their watercraft absent from New Orleans or Louisiana.

They admit in 1943 and 1944 the bulk of their tonnage originated in New Orleans and vicinity (R. p. 61).

It is testified they maintain their own office in New Orleans yearly; that none of their towboats or barges are allotted to any particular port (R. p. 61).

They state they use the wharves of the Dock Board of Louisiana for their barges; that New Orleans and Louisiana offer necessary fire, police and health protection; that the port of New Orleans had two fire-tugs, which was different from other ports (R. p. 61).

Their watercraft get the same use of these services as domestic vessels, with no cost for such services. Domestic vessels pay their full ad valorem taxes.

They carry some cargo down the Mississippi River to some points around New Orleans, to Port Sulphur, Louisiana; that the American owned approximately 200 barges in 1943 and 10 towboats; they own their own office furniture, fixtures and automobile in New Orleans; that some emergency repairs were made in this port; that New Orleans is the largest transfer point on their Line, and the southern terminus of the Line; their towboats are too big to go into the Intracoastal Canal; they loaded barges at other ports in Louisiana. (R. p. 62.)

From a summation of this evidence, it is clearly shown that New Orleans and Louisiana is the actual situs of.

an average number of this watercraft for taxation purposes; the taxing authorities have only assessed but a portion of the total valuation, leaving to other States in which these boats operate, a substantial portion of the valuation for assessment purposes, if they so desire; the Louisiana assessment being made in conformity with the Statute. This is in line with the modern concept of taxation of integrated transportation systems, and which is the fair, equitable and common-sense method of taxation. Thus, it is obvious that the Court of Appeals erred in denying New Orleans and Louisiana the right to tax under Louisiana laws, upon the false finding that these boats had no situs in Louisiana.

The Facts as to the MISSISSIPPI VALLEY BARGE LINE COMPANY.

This Barge Line falls into the same category as the American Barge Line Company, except that the evidence shows its operations to be even larger in New Orleans and Louisiana.

They, too, transport freight in interstate commerce, on the Mississippi River between Pittsburgh on the East, and for the whole length of the Ohio River and on the Mississippi River **between St. Louis and New Orleans**; they have a terminal in New Orleans, "where the company has its own operations" (R. p. 63); they use a public terminal at Baton Rouge, Louisiana. It owns the towboats "Tennessee", "Ohio", "Indiana" and "Louisiana"; it also owns 85 to 100 barges; no towboat is especially allocated to any particular service, but they are sent to whatever

port requires them, and they are not permitted to remain in any particular port any length of time, but every effort is made to keep them moving the greatest possible number of days a year, because they earn nothing when tied to the bank. (R. p. 63.)

Occasionally there may be some delay to a towboat in New Orleans for repairs; the barges are assigned in much the same way that a **railroad would assign freight cars.** (R. p. 64.) (Emphasis ours.)

A certain number of barges go beyond New Orleans to Texas points by connecting lines but their towboats do not go beyond New Orleans. (R. p. 64.)

An attempt was made to show that for some particular month during the tax years in question, that a certain towboat did not come to Louisiana (R. p. 64) but their officers explain this by saying that towboats are assigned depending on circumstances, which change almost daily, by different cargo offerings, so that one boat may not be here for some time and another boat may repeat. (R. p. 63.)

Some of their stock is owned in Louisiana and New Orleans; the City of New Orleans is the largest port on their line; they have more employees in New Orleans than in Pittsburgh because the large percentage of their freight in New Orleans is handled by themselves; they operate a wharf on the Industrial Canal in New Orleans; their facilities are greater in New Orleans than in St. Louis; some of their boat repairs are made in New Or-

leans, especially under-water work, because there are only a limited number of places on the River where boats of that size can be pulled out of the water for that work. (R. p. 65.)

The volume of cargo handled in New Orleans is greater than in any other port with the possible exception of Pittsburg, but the boats are kept moving in order to realize as much profit as possible out of the operations; their boats also dock at Baton Rouge, La. (R. p. 66.)

Most of their barges are unloaded at the Galvez St. Wharf in New Orleans; it was pointed out by the official of this Corporation that some of their barges do not get unloaded in New Orleans in time for their next boat going North, and such barges lie in New Orleans for about a two week period, and a few barges sometimes longer; that the employees of the Mississippi Valley in St. Louis total 75, whereas their employees in New Orleans total 85 to 100; he explained that there is so much cargo in New Orleans because it is a terminal point and a port, and the only point on their line through which import and export traffic moves; and it is therefore larger than their other ports; that they sent much out-of-the-country freight to New Orleans; he knows that Louisiana and New Orleans furnish fire, police and health protection for their boats; that they maintain a permanent office in New Orleans, a solicitation office being in the business section of New Orleans, and they own their own office building at the Galvez St. Wharf for the loading and unloading of their barges; that they own permanent installations at the Galvez St. Wharf in the form of tractors, trailers and

derricks; (R. p. 98) that they have been for 15 years at the Industrial Canal at Galvez St. and their wharf facilities are **greater** in New Orleans than at St. Louis. (R. pp. 66, 67.) (Emphasis ours.)

They secure fuel for their towboats in New Orleans and some fuel at Baton Rouge; that their boats were turned around as fast as possible in every port; that they have 400 feet frontage on the Industrial Canal in New Orleans and that their operations for 1944 were substantially the same as in 1943; that they also deliver and take cargo at Baton Rouge, and under their Interstate Commerce certificate they could take cargo from New Orleans to Baton Rouge. (R. p. 67.)

Another of their officials testified that most of their under-water repairs are done at New Orleans; that Pittsburgh and New Orleans are considerably ahead of St. Louis in tonnage; that they maintain about 100 employees in New Orleans; that they have their own equipment in New Orleans for servicing their barges. (R. p. 68.)

Mr. Hay, the dispatcher of this Line, who determines how their boats and barges shall move, testified that the Mississippi Valley operates on the Mississippi River and other Rivers **between Cincinnati, Ohio and New Orleans, and between St. Louis and New Orleans**; that Baton Rouge, La., is an intermediate stop; that their barges lie **idly at New Orleans** if there happens to be no use for them on their first up-bound boat, but most likely these barges would catch the next up-bound boat; that their towboats were in New Orleans from 12 to 48 hours on

each trip, depending on whether emergency repairs were necessary; he further testified that the Mississippi Valley maintains a **repair shop in New Orleans** to make those repairs which must be made to keep the equipment moving out of that port: (R. p. 68.) (Emphasis ours.)

During the year 1943 their towboats with a string of barges would arrive at New Orleans **once a week or slightly oftener**, and that this service was **constant throughout the year**; that they used whichever barges were most convenient to go to New Orleans and that **their four owned towboats ran in and out of New Orleans in 1943**; that **these four owned towboats did not go to St. Louis** during 1943 with possibly one or two exceptions, but operated on a **regular schedule** between Cincinnati and New Orleans; that a chartered boat made the run from St. Louis to Cairo and made connections with their **through schedules** between Cincinnati and New Orleans. (R. pp. 68, 69.)

"Q. But Mr. Hay would you say offhand that there were **more** of your equipment including towboats and **barges in New Orleans** during 1943 than there were in St. Louis.

"A. Yes, because it is a much bigger port." (R. P. 69.) (Emphasis ours.)

He further testified that their four owned towboats came out of Cincinnati and picked up any barges from St. Louis at Cairo, Illinois; that during 1943 New Orleans **alone** would handle about **one-half** of their cargo, and all other intermediate points between New Orleans and their point

of origin would about handle, in the aggregate, the other half. (R. p. 69.) (Emphasis ours.)

He stated that their tows coming into New Orleans are unloaded at their Galvez St. Wharf, some barges are then loaded there and some barges are distributed at points along the Mississippi River for loading in the New Orleans harbor; that their towboats do not tie up for any number of days at their Galvez St. Wharf, except where major repairs are necessary, and these are usually done at Todd-Johnson Drydocks at New Orleans. (R. p. 69.)

He testified that their reports show, for example, that Barge MV-49 (R. p. 69) arrived in New Orleans on September 10th, 1943 and did not leave New Orleans until October 28th, 1943, and he testified that this seemed to have been a barge that either remained in New Orleans for lack of cargo for its use outbound, or it could have been placed somewhere on the River awaiting arrival of expected cargo, or it could have been awaiting its chance to be temporarily repaired before it could be used; he showed that temporary repairs, to their barges, unless of an unusual nature, "could be made with their own facilities at New Orleans; their records further show (R. p. 70) that Mississippi Valley Barge BM 57 arrived in New Orleans on November 17th, 1943, and remained in New Orleans through the balance of 1943 as no date is shown of leaving New Orleans in 1943; that (R. p. 70) shows their barge in New Orleans from July 31st, 1943, to September 13, 1943; that their smaller barges, which number 50 out of their 80, might lay over in New Orleans for a greater than average length of time

due to the lack of need for the barge outbound, or to favor tow make-up; that (R. p. 70) shows Barge MB 38 stayed in New Orleans from August 23rd, to October 2nd, 1943; that (R. p. 70) shows Barge MB 46 in New Orleans from February 21st, 1943 to March 30th, 1943; that Barge MB 30, which is one of their larger type of barges (R. p. 70) stayed in New Orleans from August 31st, 1943 to October 2nd, 1943, and that it is possible that there may have been a few other barges that missed the first boat out of New Orleans through lack of cargo or because it was necessary to temporarily repair the barge before it could be used; that they attempted to maintain as quick a turn-around with their equipment in St. Louis and Cincinnati and other points, as in New Orleans, in order to keep their equipment moving; that New Orleans is **the terminus of their line**, and when they reach New Orleans they turn around to go north after discharging cargo and picking up new cargo; that they have **their own maintenance man in New Orleans** who looks after any necessary temporary repairs; that their principal port in Louisiana is New Orleans and secondarily Baton Rouge; **that all of their tows either originate in New Orleans or terminate in New Orleans**, if they are in Louisiana; that if there is no cargo for an empty barge in New Orleans and it was not needed at some other part, **the barge would no doubt wait in New Orleans for cargo**; that there is no port, over any other, where their barges are laid up indefinitely. (R. p. 70.) (Emphasis ours.)

Thus, it is clearly shown that the portion of watercraft of the Mississippi Valley Barge Line Company, sought to

be taxed here; is never out of the City of New Orleans nor the State of Louisiana, for even a single day. Of course, not every one of their barges and their towboats at one time, but surely a portion of their fleet as a part of their integrated system of freight transportation—similar to the rolling stock of the railroads, some of whose cars may not come into Louisiana for months at a time, but others making repeated trips, and on which they pay a tax on a proportionate mileage basis, exactly, as sought to be collected here. The evidence clearly shows that a substantial **average** of their towboats and barges are in New Orleans and Louisiana constantly throughout the year.

The Mississippi Valley is unable to show that this equipment spends more time in any other State, and from the evidence above, it is unlikely that their watercraft is in any other State as much as in Louisiana. They are in New Orleans **regularly and constantly at least every week with their tows**, and necessarily their barges stay here for a length of time, **definitely over-lapping the next trip, etc.** This is their biggest port and where they do most of their business from a watercraft standpoint. They have even larger facilities than the American Barge Line here, with their permanent wharfage space, about 100 employees, their own fleet maintenance men, etc. We do not believe it necessary to elaborate any further that an average portion of this watercraft is permanently in Louisiana, throughout the taxing year, making Louisiana the situs for the portion taxed, in accordance with the established and well recognized tax apportionment principles approved many, many times by this Court.

The Facts as to the UNION BARGE LINE CORPORATION.

This Company falls into a different category than the American Barge Line Company and the Mississippi Valley Barge Line Company. The two latter are Delaware corporations, who do no business in Delaware, and whose watercraft never at any time go into Delaware. The Union, however, is a Pennsylvania corporation apparently doing business in Pennsylvania, and whose watercraft also go into that State.

The Union operates on the Mississippi River System and connecting waterways, **between New Orleans and Pittsburgh**; under their tariff, they have five days free time for unloading their barges in New Orleans; they had a man in New Orleans to handle their business in 1944, whom they employed on a salary basis; their barges are handled indiscriminately throughout their whole course of operations, depending on the kind of barge needed for loading particular cargo at various points, etc.; all of their barges and towboats are kept moving as quickly as possible at all ports; most all of their traffic on the Intracoastal Canal is towed for them by other boats over to New Orleans, and the only waiting time at New Orleans was in making connections with one of their towboats; **that their barges may wait in New Orleans from one to three days for their own boat to pick them up**; that they pick up their barges in other ports in Louisiana as soon as they have a towboat to do so; they owned nine towboats and about one hundred twenty-two barges during the period in question; that some of their tow-

boats and barges made repeated trips to New Orleans in 1944, while some may not have gone to New Orleans at all during this period; the Union had a boat out of New Orleans **about once a week** during 1944; that their principal ports in Louisiana are New Orleans and Baton Rouge and that they normally run their boats to New Orleans only. (R. p. 71.) (Emphasis ours.)

In 1944, every trip ended in New Orleans with their boats and came back, but not so the barges; that no barge has a man on it; that the barge is delivered to a terminal specified by the consignee or the shipper and then moved to another point in New Orleans for cargo to be transported northbound; that they had an arrangement with other Barge Line Companies operating in and out of New Orleans for the transfer of their barges or the tying up of their barges; that their barge shipments from the North originated principally in the Pittsburgh District and in certain instances on the way down they picked up cargo at Memphis for delivery at New Orleans and other points likewise in between; that in 1944, 75% of their tonnage was up-bound and 25% down-bound, and **they very often had to take empty barges down to Louisiana to bring them back loaded**; that their principal commodities that were taken into New Orleans for delivery to that port were manufactured steel products and the principal commodities out of New Orleans were petroleum products; that the substantial portion of the up-bound cargo originated in Baton Rouge, La.; that in an emergency they did repair work to their watercraft in New Orleans; that the **five days** free time allowed in New Orleans for **unloading** was arrived at through shipper ex-

perience, in loading a barge of 500, 600 or 700 tons would take about that much time; they presume that the fire, police and health departments in New Orleans and the State of Louisiana are ready and available for service to their boats or crews when needed; that they attempt to fuel their boats in Baton Rouge, or if needed in New Orleans; (R. p. 72). The official testifying wouldn't know whether any of their crews got any of their lay-off time in New Orleans during 1944. (R. p. 72.) (Emphasis ours.)

Here again an attempt is made by appellee to show by charts that a few of their barges may not have come into Louisiana during 1944 as well perhaps as one or two of their towboats. The answer is of course that others made repeated trips in **constant** and **regular** service. (R. p. 74.) The test here is not of taxing a particular towboat or barge, but the tax is on watercraft of an integrated system of transportation, using the docks and wharves of New Orleans and Louisiana in a regular service throughout the year; in inland waterways transportation, in the same manner as the approved system of taxing rolling stock of other transportation companies.

From the facts adduced, here again is a Corporation doing a tremendous waterway transportation business in New Orleans and Louisiana. Their tows were in New Orleans **every** week, leaving barges to be unloaded, then to be loaded, which time could not expire before another of their tows came in. Thus some of their watercraft was here at all times during the year in question—not as any spasmodic or irregular service but on regular

schedule. They had an average number of their towboats and barges here constantly and continuously throughout the year. There can be no substantial difference here, therefore, from railroad or other modes of regular interstate transportation.

Under the law, then, Louisiana has a right to its fair share of the ad valorem taxes on the watercraft of the Union Barge Line Corporation.

RESUME OF THE FACTS APPLICABLE TO EACH OF THE THREE APPELLEE BARGE LINES.

The salient features of the foregoing admitted facts, applicable to each barge line, are that New Orleans is the terminus of each line—that **all** of their tows end in New Orleans, and that they arrive in that City, **AT LEAST ONCE A WEEK OR OFTENER!** (Miss. Valley R. p. 68—American R. p. 61—Union R. p. 71.)

When we therefore consider that each barge line comes into, **and ties up**, in New Orleans once a week or oftener, with a long string of barges—that the towboats **leave** all their barges in New Orleans to be unloaded there or some to be transported farther—that the towboats spend, at the very least, 24 to 48 hours in New Orleans making up their up-river tow with their other barges which had been **waiting** in New Orleans, re-loaded with different commodities (and as the Union Line says (R. p. 72), they may need up to five days in New Orleans to **reload** their barges) that they must traverse at least 400 miles up-stream in Louisiana before they cross into another state,

which necessarily takes several days (and likely stop in Baton Rouge, Louisiana, over 100 miles upstream and which is a large center for petroleum products)—obviously, then, they must meet and pass another of their own tows IN LOUISIANA, coming down the Mississippi River, in order to average arrival in New Orleans once a week or oftener, and are therefore daily passing from one end of the State to the other. Consequently, there MUST be an average number of their barges in Louisiana every day in the year—and just as emphatically there is not one minute in the year when they do not have such average equipment in Louisiana! Also, an average number of the barges left behind in New Orleans from the down-river tow must necessarily be in Louisiana until they can be picked up by their own towboat on one of the succeeding tows. This constant and continual over-lapping places this average amount of watercraft PERMANENTLY in Louisiana!

These are the only facts necessary for this Court to consider to decide this issue!

I.

THE CIRCUIT COURT OF APPEALS, AS WELL AS THE DISTRICT COURT, FELL INTO GRIEVOUS ERROR IN APPLYING THE ISSUES IN THE OLD VESSEL TAXATION CASES TO THE ISSUES PRESENTED HERE, WHEN THERE IS NO FACTUAL NOR CONSTITUTIONAL BASIS FOR SO DOING, AND THEREFORE INCORRECTLY APPLIED THE LAW OF SITUS IN THESE CASES.

The District Court went awry in attempting to show that this watercraft never acquired a tax situs in Louisiana by using as a basis for its findings the jurisprudence in the old vessel taxation cases (R. pp. 47, 48, 49), and the Circuit Court of Appeals fell into exactly the same error. (R. pp. 112, 113.)

The issues presented here, clearly do not call for the application of those legal principles to the cases at bar. These issues are far removed from the principles laid down in the old steamship cases.

We are not considering here the assessment and taxation of an individual boat or vessel (as in the vessel taxation cases), but we are considering an integrated system of transportation, wholly within certain states, and only in those states, and being taxed as a unit, with a proportion of such taxes being allotted to Louisiana. This is wholly and completely different from endeavoring to ascertain the taxing situs of an individual vessel.

We are very familiar with these individual vessel taxation cases and this Court is infinitely more familiar with this jurisprudence having had occasion to review it in many decisions.

A summation of this jurisprudence was had in the comparatively recent case of *Northwest Airlines, Inc. v. State of Minnesota*, 322 U. S. 292, 65 S. Ct. 26, where, in the footnote of the dissenting opinion (65 S. Ct. pp. 961, 962) it is noted:

"The rule, generally applied, that vessels are taxable only by the domicile, *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 597, 15 L. Ed. 254; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 430, 431, 432, 20 L. Ed. 192; *Morgan v. Parham*, 16 Wall. 471, 475, 21 L. Ed. 302; *Transportation Co. vs. Wheeling*, 90 U. S. 273, 279, 280, 25 L. Ed. 412; *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 421, 26 S. Ct. 679, 682, 50 L. Ed. 1082, 6 Ann. Cas. 205; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68, 69, 77, 32 S. Ct. 13, 14, 15, 18, 56 L. Ed. 96, is no exception to these rules. **For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all.** See *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 23, 11 S. Ct. 876, 878, 35 L. Ed. 613; *Southern Pacific Co. v. Kentucky*, supra, 222 U. S. 75, 32 S. Ct. 17, 56 L. Ed. 96. The suggestion in the earlier cases, see *Hays v. Pacific Mail S. S. Co.*, supra, 17 How. 600, 15 L. Ed. 254; *City of St. Louis v. Wiggins Ferry Co.*, supra; *Morgan v. Parham*, supra, that vessels were to be taxed exclusively at the home port, whether or not

it was the domicile, was rejected in *Ayer & Lord Tie Co. v. Kentucky*, *supra*, and *Southern Pacific Co. v. Kentucky*, *supra*, and has never been revived. But where the vessels operate wholly on waters within one state, they have been held to be taxable there, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 S. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100, and not at the domicile; *Southern Pacific Co. v. Kentucky*, *supra*, 222 U. S. 67, 72, 32 S. Ct. 14, 16, 56 L. Ed. 96, a result which, like the rule of apportionment in taxing railroad cars, avoids the burden of multiple taxation.

"Similarly, taxes by the state of domicile or other states on the carrier's entire property including rolling stock have been sustained if apportioned according to mileage, *Pittsburgh, etc., R. Co. vs. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 S. Ct. 305, 41 L. Ed. 683; *Id.*, 166 U. S. 185, 17 S. Ct. 604, 41 L. Ed. 965, *American Express Co. v. Indiana*, 165 U. S. 255, 17 S. Ct. 991, 41 L. Ed. 707; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 S. Ct. 527, 41 L. Ed. 960; *Wells, Fargo & Co. v. Nevada*, 248 U. S. 165, 39 S. Ct. 62, 63 L. Ed. 190; *St. Louis, etc., R. Co. v. State of Missouri ex rel. and to Use of Hagerman*, 256 U. S. 314, 41 S. Ct. 488, 65 L. Ed. 946; *Southern R. Co. v. Watts*, 260 U. S. 519, 43 S. Ct. 192, 67 L. Ed. 375; *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254, or a combination of relevant factors, *Rowley v. Chicago & N. W. R. Co.*, 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; *Great Northern R. Co. vs. Weeks*, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532. Likewise gross receipts taxes, if properly apportioned or otherwise limited to receipts from business done within the state, have been upheld.

Erie R. Co. vs. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; State of Maine v. Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 163, 35 L. Ed. 994, as explained in Galveston, etc., R. Co. v. Texas, 210 U. S. 217, 226, 28 S. Ct. 638, 640, 52 L. Ed. 1031; United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 38 S. Ct. 373, 62 L. Ed. 827; Pullman Co. v. Richardson, 261 U. S. 330, 43 S. Ct. 366, 67 L. Ed. 682, cf. New York, Lake Erie & W. R. Co. v. Pennsylvania, 158 U. S. 431, 15 S. Ct. 396, 39 L. Ed. 1943." (Emphasis ours.)

It would serve no useful purpose therefore to individually analyze the prior vessel taxation cases because they are not at all analogous to the issues presented here.

This type of transportation is not at all similar to steamship travel, nor to air lines—its nearest analogy would be railroads.

Steamships travel singly on the high seas—commercial airplanes fly singly in all directions—but these barge lines travel on a **fixed route** through the rivers, canals or other inland waterways on just as much a fixed route as do the railroads, except water is substituted for rails. An integrated unit of barges is made up in a tow, the same as a passenger or freight train is made up, picking up and dropping barges at different stops as is done by railroads picking up and dropping cars.

Appellees would argue strenuously that barges and towboats are capable of being appraised singly and therefore are not part of an integrated system of transportation—yet locomotives, freight cars and passenger cars are capable of being appraised singly and without relation to another engine or car belonging to the line—so what can such an argument prove? Yet in the case of the railroads, such appraising is never done in this manner, but is accomplished on the unit basis—exactly as has been done here with the barge lines.

Appellees would likewise argue that some of their barges and towboats were seldom if ever in Louisiana—yet others were there constantly on repeated trips. No one denies that some of the railroads' equipment might never come into a state during the year while other pieces are there on repeated occasions. Yet the rolling stock is recorded as a unit and a proportion taken. This is the only practical, feasible and common-sense method of assessment.

Why consider charts, made by appellees themselves, showing percentage of time of their individual towboats and barges in Louisiana when the undisputed facts prove beyond question that some of their watercraft is operating in Louisiana every day in the year. What practical difference does it make if some of their boats and barges are in the state more than others?

Even, if, as appellees vigorously contend, these barges and towboats are constantly on the move "for they earn nothing when tied to the bank" then the percentage mile-

age formula (as set forth in the Louisiana Statute) is intrinsically correct, fair and equitable. For they must be constantly travelling over their same mileage and the percentage of mileage in Louisiana is the correct proportion of the tax for an average number of this watercraft **must** be in Louisiana every day of the year. New Orleans and Louisiana are the termini of their regular schedule and they must be in that place constantly and consistently throughout the year, as they only go to and through the same places and the same waters at all times; their tows are made up to **all** terminate in Louisiana.

Louisiana is perfectly willing to consider in their total mileage all waters and places to which they send their watercraft in order to figure its percentage of taxation.

Appellees only travel over certain waterways regularly throughout the year, and while mathematical exactitude is not essential, yet it can be easily and readily calculated in these cases.

The assessment has been made as a unit—it could be made in no other practical, workable manner. If the percentage is smaller than actually assessed, appellees can secure a reduction in the assessment, as such information has been constantly sought from appellees by the Louisiana Tax Commission and arbitrarily refused by these three barge lines.

The principles of the old steamship cases do not apply here. We have no quarrel with such jurisprudence but it does not touch the issues presented here.

This is an entirely new phase of an old question and must be considered as such. This Court has never passed on the right of a State through which barge lines operate regularly and constantly and continuously throughout the year, to tax these integrated interstate barge lines on the proportionate mileage basis.

The nearest comparison would be the railroad cases—which gives the States through which they operate—the right to a proportion of the tax.

No other jurisprudence fits the issues here.

This Court has always had the courage and foresight to take cognizance of changing economic conditions in this country in deciding issues on a logical and equitable basis when there has been no violation of the Federal Constitution. That is what we ask here, for certainly a State has a right to its taxes, and the burden of proof is upon the taxpayers to show a prohibition in the Constitution. This appellees cannot do.

Appellees must show a clear violation of the 14th Amendment to prevail. This, we respectfully submit, they cannot do.

Commercial barge lines, in competition to rail and road movement are a comparatively new field. Other methods of transportation, with which they compete, must pay taxes on their equipment, and it is only fair and just that such barge lines bear their fair share of taxes.

It would be a monumental injustice to foreclose to the States the right to tax this watercraft equipment, operated in such constant and regular movement, when other similar transportation companies, are forced to pay.

Louisiana is not asking here to tax one boat, but to a proportionate tax on a transportation system doing business in Louisiana, the exigencies of which business places some of its equipment in Louisiana every day of the year.

Since the Louisiana Statute (Act 59 of 1944) fixes the situs in Louisiana for the proportion sought to be taxed, it is incumbent upon appellees to show such Statute unconstitutional.

Even against their inability to show this, the record clearly indicates that a portion of this equipment is permanently in Louisiana, demonstrating Louisiana to be the situs of this average portion of such watercraft.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT APPLYING THE PROPORTIONATE RULE OF TAXATION AS TO MILEAGE IN THESE CASES, AS CALLED FOR IN THE LOUISIANA STATUTE.

In line with the facts presented here, is the case of *Pullman's Palace Car Company v. Pennsylvania*, 141

U. S. 18, 11 S. Ct. 35, 35 L. ed. 613, wherein the Court said:

"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed; but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and from upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it would not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact, that instead of stopping at the state boundary, they cross that boundary **in going out and coming back**, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, **without regard to the place of the owner's domicile**, could tax the specific cars, which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state. (Emphasis ours.)

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such porportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States."

In the earlier case of *Marye vs. Baltimore and Ohio Railroad Co.*, 127 U. S. 117, 8 S. Ct. 1037, the Court had occasion to observe:

"It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true; as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for

other purposes, that **situs** may be fixed in **whatever locality the property may be brought and used by its owner by the laws of the place where it is found.** If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there **habitually to use and employ** a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, **its fair share of the burdens of taxation** imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an **appraisement and valuation of the average amount of the property thus habitually used**, and collected by distraint upon any portion that might at any time be found. . . . "the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (Emphasis ours.)

In both the *Marye Case* (1888) and the *Pullman's Palace-Car Co. Case* (1891) *supra*, as well as in the later cases of *American Refrigerator Transit Co. vs. Hall*, 174 U. S. 70, 19 S. Ct. 599, 43 L. ed. 899 (1899), *Union Refrigerator Transit Co. vs. Lynch*, 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708 (1900); *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); *Union Tank Line Co. vs. Wright*, 249 U. S. 275, 39 S. Ct. 276,

63 L. ed. 602 (1919), and *Johnson Oil Ref. Co. vs. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238, (1933) this Court has uniformly held that where a corporation brings into a state **other than the other granting it the corporate charter**, a portion of its movable property to therein employ and use the same in the conduct of its business operations for profit, **carried on as one entity**, in more than one state, such **permanently established portion** may be constitutionally taxed in said second state, by resorting to the generally adopted and approved method of first valuing as a unit the entirety of the taxable corporate property employed in the interstate operations, taking into consideration the uses to which it is put and all elements making up its aggregate value, and then ascertaining what proportion of the corpus may be fairly taxed as being within the bounds of the State in interest, without violating any Federal restriction.

The Circuit Court of Appeals fell into grievous error in not holding Louisiana has established that a portion of the property sought to be taxed was "regularly and habitually used and employed" within Louisiana. The facts clearly show that a portion of each of the watercraft of these Lines were regularly and habitually used and employed in Louisiana—certainly not the same towboat and barge (no more than the same railroad car)—but definitely the same average number of this watercraft. Because of their bulk and slower mode of travel, these barges were in Louisiana longer at each time than a railroad car, which can unload and re-load in one day. Equally, a towboat cannot travel as fast as a locomotive.

An important milepost in the juridical history of this Court was its decision in *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299, 25 S. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100, wherein the Court held that vessels could be taxed in a State other than the domicile of the owner or the home port of the vessel. Then, as this Court held, if watercraft on navigable waters can have a situs of its own, regardless of the owner's domicile, it squarely supports appellants' contention as to the issue here. 1

While it is true, the watercraft was on navigable waters wholly within one state in the *Old Dominion* case (*supra*), we can certainly see no logical reason why an average portion of the watercraft of an integrated interstate waterway carrier cannot have a permanent situs of its own in one state.

The case of *Northwest Airlines v. Minnesota* (*supra*) of course held that the State of domicile (Minnesota) had the right to tax this entire fleet of airplanes but would not hold that other states could not also tax a part of this fleet, stating that this issue was not then before the Court. Mr. Justice Black, in his concurring opinion, would not in that case "foreclose consideration of the taxing rights of States other than Minnesota". (64 S. Ct. p. 955.)

The majority opinion, with Mr. Justice Frankfurter as the organ of the Court, sustains appellants' contention, when it sets forth:

"... the continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitu-

tional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered." (64 S. Ct. p. 953.)

And here, as in the case of *Pullman's Palace Car Company v. Pennsylvania* (*supra*), cited in the majority opinion of the *Northwest Airlines* case (*supra*), the barges of these companies here are "daily passing from one end of the State to the other".

The majority opinion in the *Northwest Airlines* case (*supra*) therefore, sets forth the principles which appellants contend grants Louisiana this power to tax, as does the dissenting opinion, when Mr. Chief Justice Stone, joined by three other members of the Court, sets forth in such dissenting opinion:

"It is no longer doubted that interstate business 'must pay its way' by sustaining its fair share of the property tax burden which the states in which the interstate business is done may lawfully impose generally on property located within them. See *Western Live Stock v. Bureau*, 303 U. S. 250, 254, 255, 58 S. Ct. 546, 548, 549, 82 L. Ed. 823, 115 A. L. R. 944, and cases cited * * * or if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state, as has until now been the rule as to railroad cars. *Marye v. Baltimore & Ohio R. Co.*, 127 U. S. 117, 123, 124, 8 S. Ct. 1037, 1039, 1040, 32 L. Ed. 94; *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613; *American Refrigerator Transit Co. vs. Hall*,

174 U. S. 70, 19 S. Ct. 599, 43 L. Ed. 899; *Union Refrigerator Transit Co. vs. Lynch*, 177 U. S. 149, 20 S. Ct. 631, 44 L. Ed. 708; *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Germain Refining Co. v. Fuller*, 245 U. S. 632, 38 St. Ct. 63, 62 L. Ed. 521; *Union Tank Line v. Wright*, 249 U. S. 275, 39 St. Ct. 276, 63 L. Ed. 602; *Johnson Oil Refining Co. vs. Oklahoma*, 290 U. S. 158, 54 St. Ct. 152, 78 L. Ed. 238.

* * * They do not deny that the planes are constitutionally subject, to some extent, to personal property taxes by the states through which they pass. Our decisions, as will presently appear, establish that they are, and that vehicles of interstate transportation moving from the state of the owner's domicile over regular routes within the jurisdiction of other states also acquire a tax situs there, so that, to an extent presently to be considered, they may be taxed by each of the states through which they pass.

* * * Of controlling significance in this case are certain elementary propositions, so long accepted and applied by this Court that they cannot be said to be debatable here, although they seem not to have been taken into account in deciding this case either here or in the Minnesota Supreme Court. The first is that the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner. *Union Refrigerator Transit Co. v. Kentucky*, supra, 290 U. S. 161, 162, 54 S. Ct. 153, 154, 78 L. Ed. 238, *Johnson Oil Refining Co. v. Oklahoma*, supra, and

cases cited. In this respect, as this Court has often pointed out, the taxation of chattels rests on a different basis than does the taxation on intangibles, which have no physical situs and may be reached by the tax gatherer only through exertion of the power of the state over the person of those who have some legal interest in the intangibles. *Union Refrigerator Transit Co. v. Kentucky*, *supra*, 199 U. S. 205, 206, 26 S. Ct. 38, 39, 50 L. Ed. 150, 4 Ann. Cas. 493; *Schwab v. Richardson*, 263 U. S. 88, 92, 44, S. Ct. 60, 62, 68 L. Ed. 183; *Frick v. Pennsylvania*, 268 U. S. 473, 494, 45 S. Ct. 603, 606, 69 L. Ed. 1058, 42 ALR 316; *Blodgett v. Silberman*, 277 U. S. 1, 16—18, 48 S. Ct. 410, 416, 72 L. Ed. 749; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 209, 210, 56 St. Ct. 773, 776, 777, 80 L. Ed. 1143; *Curry v. McCanless*, 307 U. S. 357, 363—366, 59 St. Ct. 900, 903-906, 83 L. Ed. 1339, 123 A. L. R. 162; *Graves v. Elliott*, 307 U. S. 383, 59 St. Ct. 913, 83 L. Ed. 1356; *Graves v. Schmidlapp*, 315 U. S. 657, 62 St. Ct. 870, 86 L. Ed. 1097, 141 A. L. R. 948; *State Tax Com. v. Aldrich*, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A. L. R. 1436.

"A state may, within the Fourteenth Amendment, tax a chattel located within its limits, although its owner is domiciled elsewhere, *Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257; *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *Pullman's Palace-Car Company v. Pennsylvania*, *supra*; *Old Dominion S. S. Co. v. Virginia*, *supra*.

"But due process precludes the state of the domicile from taxing it unless it is brought within that state's boundaries, *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669, 49 L. Ed. 1077; *Union Refrigerator Transit Co. v. Kentucky*, *supra*; *Frick v.*

Pennsylvania, *supra*, 268 U. S. 489, *et seq.*, 45 S. Ct. 604, *et seq.*, 69 L. Ed. 1058, 42 A. L. R. 316. It is plain then that for present purposes and so far as the Fourteenth Amendment is concerned respondent's airplanes, which are chattels regularly moving over fixed interstate routes, are subject in some measure to the taxing power of every state in which they regularly stop on their interstate mission.

"In some instances it may be that vehicles of transportation moving interstate are so sporadically and irregularly present in other states that they acquire no tax situs there, *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L. Ed. 254; *City St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Morgan v. Parham*, 16 Wall. 471, 21 L. Ed. 302; *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409, 26 S. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205, and hence remain taxable to their full value by the state of the domicile because they are not taxable elsewhere; *New York Central & H. R. R. Co. v. Miller*, *supra*; *Southern Pacific Co. v. Kentucky*, *supra*." But that is not the case as to any of the planes here involved. And our decisions established that, except in the case of tangibles which have nowhere acquired a tax situs based on physical presence, and for that reason remain taxable at the domicile even if never present there, the state's power to tax chattels depends on their physical presence and is neither added to nor subtracted from because the taxing state may or may not happen to be the state of the owner's domicile.

"This Court has never denied the power of the several states to impose a property tax on vehicles used in interstate transportation in the taxing state:

It has recognized, as we have seen, that such instruments of interstate transportation, at least if moving over fixed routes on regular schedules, may thus acquire a tax situs in every state through which they pass. And it has met the problem of burdensome multiple taxation by the several states through which such vehicles pass by recognizing that the due process clause or the commerce clause or both preclude each state from imposing on the interstate commerce, involved an undue or inequitable share of the tax burden. In *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 365, 60 S. Ct. 968, 970, 84 L. Ed. 1254, we recently considered 'the guiding principles for adjustment of the state's right to secure its revenues and the nation's duty to protect interstate transportation.' We declare that 'The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' And, in sustaining the tax apportioned according to mileage, upon the entire property, including rolling stock, of an interstate railroad, imposed by Tennessee, the state of the owner's domicile, in which its principal business office and over 70% of its trackage was located, we said that the state could not 'use a fiscal formula * * * to project the taxing power of the state plainly beyond its borders.'

"This Court has accordingly held invalid state taxation of vehicles of interstate transportation unless the tax is equitably apportioned to the use of the vehicles within the state compared to their use without, whether the tax is laid by the state of the domicile or another. Such an apportionment has been sustained when made according to the **mileage traveled within and without the state**, Pullman's Palace-Car

Co. v. Pennsylvania, *supra*, 141 U. S. 26, 11 S. Ct. 879, 35 L. Ed. 613, or the average number of vehicles within the taxing state during the tax period. *Marye v. Baltimore & Ohio R. Co.*, *supra*; *American Refrigerator Transit Co. v. Hall*, *supra*, 174 U. S. 82, 19 S. Ct. 604, 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, *supra*. (Emphasis ours.)

"But if the tax is laid without apportionment or if the apportionment, when made, is plainly inequitable so as to bear unfairly on the commerce by compelling the carrier to pay to the taxing state more than its fair share of the tax measured by the full value of the property, this Court has set aside the tax as an unconstitutional burden on interstate commerce, whether it be in form on the rolling stock, *Union Refrigerator Transit Co. v. Kentucky*, *supra*; *Union Tank Line v. Wright*, *supra*; *Johnson Oil Refining Co. v. Oklahoma*, *supra*, or on the carrier's entire property, *Fargo v. Hart*, 193 U. S. 490, 24 S. Ct. 498, 48 L. Ed. 761; or on a franchise or right to do business, *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 S. Ct. 39, 48 L. Ed. 134; *Wallace v. Hines*, 253 U. S. 66, 40 S. Ct. 435, 64 L. Ed. 782; *Southern R. Co. v. Kentucky*, 274 U. S. 76, 47 S. Ct. 542, 71 L. Ed. 934; cf. *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394.

* * *

"The taxation of vehicles of interstate transportation in a business organized and conducted as is petitioner's is as capable of apportionment, and the insupportable multiple tax burden on interstate commerce is as readily avoided by apportionment of the tax, as in the case of the taxation of tangible and intangible property of railroads, railroad car supply

companies, express companies, and the like which we have repeatedly held to be subject to the rule of apportionment.

“ * * * These findings establish that, while no particular plane is permanently within any state, its planes are continuously flying in, and an average number or a percentage of the total is regularly, i. e., ‘permanently’ within, each of the states through which they pass. Here, as was the case in *Pullman’s Palace-Car Co. v. Pennsylvania*, *supra*, (141 U. S. 18, 11 S. Ct. 877, 35 L. Ed. 613), the same planes are ‘running into, through, and out of’ each of the states along petitioner’s routes and an ‘average’ of planes is continuously within each of these states.”

And even as Mr. Justice Jackson says in his concurring opinion in the *N. W. Airlines* case (*supra*): “There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes.”

There is likewise a physical basis within the State for the taxation of these barges because they are **always** within the State. They can always be seen, heard and touched, the same as rolling stock. They cannot be taken out of the inland waters of the State, except by their regular means of propulsion. An airplane may fly into the stratosphere and lose all touch with land—but not so this inland watercraft. It is within the State at all times and subject to the same degree of permanence and protection as rolling stock.

There can be no legal difference, as to taxing situs, between rolling stock and this type of watercraft. Obvious-

ly, there is a physical difference because one moves on land and one on inland waters. But the waters moved on are the property of the State—the same as the land railroads use. Because the surface use of the waters is free does not make the watercraft exempt from taxation. The railroads have to pay for the right-of-ways they use and additionally pay taxes on such real estate, and additionally pay a proportionate tax on their rolling stock.

The Interstate Commerce Commission regulates and controls the movements of the railroads and likewise regulates and controls the movements of these appellee barge lines! (R. p. 35.)

The river beds and canal beds are the property of the states enclosing them—only the right of navigation thereon is free. The fact that this watercraft pays nothing to travel upon the waters does not destroy the fact that they are permanently within the sovereign confines of the state, thus clearly establishing a taxing situs.

Additionally, these barges are but a bulk of steel or wood—without even propulsion power of their own—the same as freight and passenger railroad cars. They are not “vessels” capable of navigating the high seas but can only physically travel upon restricted waters and only in certain places.

Thus it can be clearly seen that there can be no sound legal differentiation, as to tax apportionment, between railroad rolling stock and inland barges. They both travel through defined states, on a fixed route, and in regular

interstate commerce. Their route is just as fixed as railroads, because they cannot leave the rivers or canals—are confined within their banks—and travel between various cities **regularly** and **constantly** as shown by the undisputed testimony of the barge lines themselves.

JII.

THE CIRCUIT COURT OF APPEALS ERRED IN NULLIFYING THE CLEAR PROVISIONS OF THE LOUISIANA STATUTE AND IN EFFECT HOLDING THAT THESE PROVISIONS OF THE LOUISIANA STATUTE VIOLATE THE DUE-PROCESS-OF-LAW CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

As has been shown, there is no dispute as to the facts. All of the facts were adduced from appellees themselves for they were solely in their possession. We are simply asking the Court therefore to apply the uncontradicted facts to the issues presented here.

Appellees own facts therefore show that their lines run into Louisiana and they operate these lines on a regular schedule. They operate on a fixed route or on a route that cannot be changed, or at least has never been changed. Each of these three barge lines admit that their tow boats with a long string of barges arrive in New Orleans, the southern part of Louisiana, at least once a week or oftener; they then go back North, and the process is maintained continually and constantly.

No matter how appellees attempt to juggle these facts, they cannot deny the fact of their watercraft being in and out of Louisiana regularly and continually. They tried to make much of the fact that the boats are unloaded and loaded as quickly as possible, but they also have to do this in every port. The faster they move, the more often they are in Louisiana—the slower they move, the longer they are in Louisiana.

These admitted facts cannot be manipulated to show that an average portion of this watercraft is out of Louisiana even for one day of the year. That, therefore, places the situs of this average number of watercraft in the State, which meets all constitutional requirements to furnish the basis for the taxes.

The commerce clause is not offended because Louisiana is only taxing that portion that is in Louisiana and which portion no other State has the right to tax.

The concurring opinion of Mr. Justice Frankfurter in the case of *State Tax Commission v. Aldrich* (1942), 316 U. S. 174, 62 S. Ct. 1008, points out:

"Each State of the Union has the same taxing power as an independent government, except in so far as that power has been curtailed by the Federal Constitution.

"The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its

inspection laws, Art. I, Sec. 10, Cl. 2; no State can, without the consent of Congress lay any tonnage duties, Art. I, Sec. 10 Cl. 3; and (3) by virtue of the Commerce Clause, Art. I, Sec. 8, Cl. 3, no State can tax so as to discriminate against Interstate commerce."

These limitations on the taxing power remain today and the only one that could have any pertinency to this case is the last, so that, once it is shown that the State of Louisiana has furnished protection and service to the watercraft, as it admittedly has, the question is if the tax levied by the State and the City of New Orleans on these vessels is discriminatory against interstate commerce.

The State of Louisiana and the City of New Orleans, so the record shows, makes available to the watercraft health, police and fire protection and dock facilities, the same as it does domestic vessels. It cannot be said therefore, that Louisiana and New Orleans lack jurisdiction to tax because they give nothing in return for the tax imposed. We shall pass, therefore, to a discussion of the non-discriminatory nature of the tax as respects interstate commerce.

It is undeniable that a state may tax the instruments used in interstate commerce without offending the commerce clause of the Federal Constitution (*Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. 961; *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 58 S. Ct. 736), even where the nature of the commerce is maritime (*Old Dominion S.S. Co. v. Virginia*, 198 U. S. 299, 305, 25 S. Ct. 686) and the cases where such

taxes have been invalidated by the courts are limited to situations where a number of states would have an equal right and opportunity to impose similar taxes, resulting in a pyramiding of tax burdens which would destroy or seriously impair such commerce (*Western Live Stock Co. v. Bureau*, 303 U. S. 250, 255, 256, 58 S. Ct. 546), or cases where the statute provided an illegal method of computing the tax, as in the case of a tax on gross receipts from interstate business. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 93, 94, 58 S. Ct. 72; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 S. Ct. 126; *Givin White & Prince v. Henneford*, 305 U. S. 434, 59 S. Ct. 325.

The application of the tax herein complained of cannot result in any pyramiding of taxes which would tend to destroy or seriously impair interstate commerce because the Louisiana statute imposing it is levied on a proportionate basis only. (Act 152 of 1932, as amended by Act 59 of 1944. (*Dart's Louisiana Statutes*, Section 8370.)

If other States through which the appellees' watercraft travel would impose ad valorem taxes based upon Louisiana's method of assessment, the sum total would amount to no more than a single assessment of the total value of the watercraft. Vessels engaged in intrastate commerce in Louisiana are assessed for their full value, so that the statute does not discriminate in favor of domestic commerce and the appellees do not pretend that it does.

That those engaged in interstate commerce are expected to bear their just share of the burden of state taxa-

tion and enjoy no immunity from state taxation merely because they are engaged in such commerce is shown by the case of *McGoldrick v. Berwind-White Coal Mining Co.*, 307 U. S. 33, 60 S. Ct. 388, 362, in which the Supreme Court said:

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823, 115 A. L. R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states; * * *. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited."

In order for the Court to invalidate the tax on appellees' watercraft, it must point to some prohibition in the Federal Constitution and, since it appears that no such prohibition is contained in either the Fifth or the Fourteenth Amendment or in the commerce clause, the State of Louisiana may impose the tax. In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, Chief Justice Marshall, as the organ of the Court, said:

"The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is con-

ceived, similar in the terms of their nature. Although many of the powers formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division, and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce * * *." (Pp. 199, 200.)

"In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution; then, considers these powers as substantive and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes; and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce. (Pp. 201, 202.)

"The right to regulate commerce, even by the imposition of duties was not controverted; but, the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

"These restrictions, then are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do purpose to restrain." (Pp. 202, 203.) (Emphasis ours.)

The watercraft here taxed do not just occasionally and sporadically come into Louisiana. They are, as shown by the record, on regular schedule between the ports of Louisiana and other ports on the Mississippi and Ohio

Rivers; they are constantly pursuing regular routes of travel in and out of the state, so that the protection afforded by the state and the facilities offered by it to this watercraft is continuous, and such a situation furnishes a constitutional basis for the imposition of an ad valorem tax.

The due process of law clause of the Fourteenth Amendment is likewise not offended because Louisiana is not trying to project its tax arm beyond the confines of the State, and is only taxing that portion of property over which it has dominion and control.

Louisiana gives the same protection to that portion of watercraft of appellees' barge lines which is always in Louisiana the same as it does to its domestic vessels and, therefore, by no stretch of the imagination can this issue be reasoned to offend the due process of law clause. Louisiana has the legal right to its share of these taxes because it is the only state which gives permanent protection throughout the year to that portion of the watercraft constantly within its borders, which no other state can nor does give.

Be it remembered that the only issue before this Court is whether Louisiana can secure its portion of taxes and not whether the state of domicile can exact ad valorem taxes. As an admitted matter of fact, the states of domicile here do not levy taxes, but whether they do or do not has no bearing on Louisiana's right to tax. Certainly Louisiana is not trying to collect its share of the taxes because some other state does not. The formula used by Louisiana taxing authorities violates no constitutional pro-

vision and even if any other state or states should choose to tax is of no moment here because even if they did, Louisiana's method prevents a duplication of taxes or multiplication of taxes and consequently can offend no provision of the Constitution.

In passing, we might point out that it would be a rare innovation if Delaware, the corporate domicile of both the American Barge Line and the Mississippi Valley Barge Line, would be given a right to also tax, for Delaware is simply the resting place of the charter of these corporations with all of this watercraft permanently absent from the State of Delaware and with no business whatsoever, in connection with the operation of these barge lines, being conducted from that state.

Even if the vessel taxation vessels could be said to apply here (which we respectfully contend they cannot), we do not believe this Court could hold that Delaware, the corporate domicile of American and Mississippi Valley could qualify as the "domicile" to tax these towboats and barges, when this watercraft does not enter that State nor was ever intended to go there, and when no operation of these lines is carried on from Delaware, that State being simply the resting place for a charter. What protection could Delaware give? It "can afford no substantial protection to the property taxed and cannot effectively lay hold of any interest in the property to compel payment of the tax". *Union Refrigerator Transit Co. v. Kentucky* (supra); *Frick v. Pennsylvania*, 268 U. S. 473, 489, et. seq.

Yet tangible property must have a taxing situs somewhere—it cannot wholly escape taxation! *Southern Pacific Co. v. Kentucky (supra)*.

And as Mr. Justice Frankfurter, as the organ of the Court, in the *Northwest Airlines* case (*supra*), says:

“* * * But no judicial restriction has been applied against the domiciliary State except when property (or a portion of Fungible Units) is permanently situated in a State other than the domiciliary state.”

However, it is not on the negative proposition that Delaware, the corporate domicile, cannot tax, but on the positive, undisputed facts which makes Louisiana the situs of a portion of these vehicles of commerce which makes appellants' position sound and which makes appellees' position untenable.

Therefore, as contended, the right of the State of domicile to tax is not the issue here, and need not be passed on by this Court. Appellants' position is that each of these three barge lines have given their watercraft a situs of its own as a result of its operations, and such situs of an average portion is clearly in Louisiana for the purpose of these taxes. This is in line with the principles laid down by this Court for over half a century and never deviated from.

THE METHOD OF ASSESSMENT EMPLOYED HERE IS LEGAL AND CONSTITUTIONAL

The assessment by the Louisiana Tax Commission violates no prohibition of the Constitution of the United States either as to method or amount. Counsel for appellees may seek to argue that the method employed by the Louisiana Tax Commission in assessing this watercraft was "arbitrary and capricious and based on no known fact of value"; as set forth in complaints. Suffice to say, neither the District Court nor the Court of Appeals found any merit whatever in this contention and disposed of it without any difficulty.

The assessment was made by the Louisiana Tax Commission, the official assessment body of the State, and made in conformity with the statute, that is, on the basis of the mileage of appellees' system and route in Louisiana as compared with their total mileage of their route or system. The Louisiana Tax Commission sought by every means at its command to secure exact information from appellees as to the value of their boats and complete mileage of their system as admitted in the stipulation (R. pp. 33, 34). The Commission sent numerous letters and sent its field men to appellees in an attempt to secure this information, and it was the appellees who acted arbitrarily by absolutely refusing to give the information. The Commission then made the assessment "from the best information it was able to obtain", which is in compliance with Louisiana law. If appellees do not like the method or amount of assessment, there is ample legal procedure under Louisiana law to make any adjustments necessary.

Appellees did not choose to do this and that is why this issue is now before this Court.

Values were not taken out of the "thin air", as counsel might hope to have this Court believe, but were taken from similar tow boats and barges of other lines whose value was disclosed to the Tax Commission. (R. p. 76.) There is absolutely no merit to appellees' contention as shown by the Court of Appeal decision. (R. pp. 113, 114.)

Mathematical exactitude has never been a constitutional requirement, but the proportionate mileage basis employed by Louisiana can give mathematical exactitude if appellees would but give the exact information rather than arbitrarily withholding it. These barge lines operate on a definite amount of mileage, which is known to them, and the mileage in Louisiana is definitely ascertainable so as to present no problem to give this assessment exactness to which no one could complain.

We dislike to burden the Court with the mention of this issue, but because it may be argued, we believe that the above few remarks should amply dispose of it. Appellees' argument here is untenable.

CONCLUSION.

Because what Louisiana is doing here, in the method of tax apportionment, conflicts with no jurisprudence of this Court—because it violates no prohibition of the Constitution of the United States—because such taxation is made in conformity with the Statute of a sovereign State—because it is fair and equitable and puts no undue burden on interstate commerce—because such method of taxation

banishes the twin spectres of multiple taxation and tax exemption—we respectfully pray that this Court reverse the ruling of the United States Circuit Court of Appeals for the Fifth Circuit in these nine cases and render judgment for appellants so that justice, equity and fair play may prevail!

Respectfully submitted,

BOLIVAR E. KEMP,

Attorney General of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

*City Attorney for the City of
New Orleans;*

HENRY B. CURTIS,

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HOWARD W. LENFANT,

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Counsel for Appellants.

CERTIFICATE.

This is to certify that copies of this Brief have been served on opposing counsel on this . . . day of December 1948.

.....

APPENDIX.**Act No. 152 of 1932.**

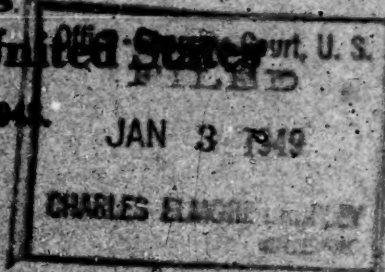
Section 1. Be it enacted by the Legislature of Louisiana, That Section 29 of Act 170 of 1898, entitled "An Act to provide an annual revenue for the State of Louisiana by the levying of annual taxes upon all property not exempted from taxation and by prescribing the method of assessing and collecting the same, and of enforcing payment thereof in the several parishes of the State and setting forth the purposes for which said levy is made", be and the same is hereby amended and re-enacted so as to read as follows:

Section 29. That the real estate, road-beds, roads, iron, tracks, depots, sheds, freight sheds, warehouses, oil and water tanks, round houses, shops, superstructures, excavations and channels of railroads; canals, and other transportation, telephone and telegraph companies, shall be assessed and taxed in the parish or assessment district where located. Ferry boats, tugs, barges, or other water craft, or rolling equipment, as well as landings used in connection with the water transfer of passengers, locomotives, passenger and freight trains, automotive equipment, and vehicles of every kind and character, that ply between two parishes shall be assessed equally one-half in each parish but where the ferries or water transportation, including rolling equipment, etc., used in connection therewith, should ply between more than two parishes, the assessment shall be divided equally among the several parishes, and where said ferries or water transportation

including rolling equipment, etc., used in connection therewith plies between both banks of the same parish they shall be assessed wholly in the parish in which they may be located or operated; and all other property not especially exempted from taxation by Article X, Section 4 of the Constitution of 1921 belonging to said railroad, canal, etc., shall be assessed and taxed at the domicile or principal office of said railroads, canals, etc., as contemplated by Article XIII, Section 4 of the Constitution of 1921; but the rolling stock or movable property of any railroad company, telegraph company, canal company or other transportation company, whose line lies partly within this State and partly within another State, or States, or whose sleeping cars run over any line lying partly within this State or partly within another State, or States, shall be assessed in this State in the ratio which the number of miles of the line within the State has to the total number of miles of the entire lines.

Section 2. That all laws or parts of laws in conflict herewith, be and the same are hereby repealed.

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Supreme Court of the United States
OCTOBER TERM, 1949



No. 244

**LIONEL G. OTT, Commissioner of Public Finance and
Ex-officio City Treasurer of the City of New Orleans,
Et AL,**

Appellants,

versus

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**Appeal from the United States Circuit Court of Appeals
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MAY IT PLEASE THE COURT:

In the interest of clarity, and to eliminate confusion, appellants file this reply brief, as appellants must necessarily take issue with certain points and allegations set forth in appellees' brief.

AS TO THE JURISDICTION OF THIS COURT.

Appellees would tell this Court in their brief ("Statement of the Case"—p. 4) that, because another case "in the Circuit Court of Appeals (DeBardeleben Coal Corporation) was decided in favor of present appellants, that the United States Circuit Court of Appeals and the United States District Court, did not, in effect, hold this Louisiana Statute unconstitutional. We must take sharp issue with this reasoning, and the statement upon which it is based.

In the first place, the *DeBardeleben* case is not before this Court and the facts and opinion therein are *dehors* this record. We dislike to discuss anything outside the transcript, but, because appellees have made certain bold statements regarding this extraneous matter, we feel it necessary to accurately explain the point.

The decisions of the lower Courts, as to the *DeBardeleben* case, of course, speak for themselves.

The District Court, in its "Conclusions of Law" (68 Fed. Sup. p. 52) sets forth:

"6. The tax situs of **all** of the DeBardeleben Coal Corporation's Coyle Lines watercraft employed in its common carrier water transportation operations out of the port of New Orleans, was in the State of Louisiana **alone**. (Emphasis supplied.)

"8. The attempted assessment of any of the taxable movable property of Coyle Lines (DeBardeleben),

which had its sole taxation situs within the State of Louisiana, as that of a transportation company whose 'line' lay partly within that state and partly within another state or states, was illegal, null and void.

"9. The taxes exacted thereunder, from DeBardeleben Coal Corporation, were illegal.

""

The District Court, in its opinion, upon which the above Conclusions of Law are based, stated that the Louisiana Statute in question "apparently envisaged no such factual situation as existed" with reference to DeBardeleben (68 Fed. Sup. p. 49).

Obviously, then, the District Court did not apply the Louisiana Statute (Act 52 of 1932 as amended by Act 59 of 1944) to the *DeBardeleben* case, but held it inapplicable as to that issue.

Upon appellants showing the Circuit Court of Appeals that upon such a finding of fact (*DeBardeleben's* watercraft having its sole situs in Louisiana), Louisiana was entitled to any share of such taxes it chose to assess, of course, the Circuit Court of Appeals decided in favor of appellants as to *DeBardeleben*. (166 Fed. 2nd p. 514). This was upon the theory that any tangible property found to have its sole taxing situs in one State, could be taxed under the general taxing laws of such State, the same as domestic property, without regard to a special tax apportionment Statute such as the one under consideration here.

Thus, the Circuit Court of Appeals did not, as appellees would have this Court believe, uphold the constitutionality of this special statute of tax apportionment in the *DeBardeleben* case, but allowed Louisiana to collect its taxes in that case under its general taxing power over property all of which is permanently located in one State, and for which collection it needs no special Statute. It only remanded the case to the District Court to ascertain if any property in an outside State was included in the assessment, and if so, to exclude that amount.

The above facts speak for themselves.

Clearly, then, the Circuit Court of Appeals did not uphold the constitutionality of this tax apportionment Statute in one case, but on the contrary did not apply it in that case. Conversely, the Circuit Court of Appeals has, in effect, as to these cases now before the Court, denied the constitutionality of the Louisiana Statute (Act 59 of 1944) and held it repugnant to the Constitution of the United States, which gives rise to this appeal, as a matter of right (Judicial Code, Section 240, as amended—Title 28 U. S. C. A. Section 347 (b))—all as more fully set forth in our original brief.

Significantly, appellees in their summation of this point in their brief (p. 6), state that the statute is unconstitutional!

ARGUMENT

As to the appellees' argument in their brief, very little need be said. The suppositions and analogies sought to be drawn are not at all consonant with the facts.

Louisiana, obviously, would not attempt to declare a situs in that State for property which visited infrequently or spasmodically but the Statute was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.

The Statute was intended to cover, and actually covers, interstate operations just such as performed by these three barge lines. They run their "lines" into Louisiana day in and day out, week in and week out, and year in and year out, and while "lines" has a well recognized meaning it has even been defined by the Courts of this land:

"Webster's New International Dictionary, 2d Ed., p. 1435 gives as one of the definitions of 'line'—'A number of public conveyances, as carriages, or **vessels, plying regularly under one management over a certain route;** and the word '**foute**' is defined as '**A trodden or usual way.**'" (Emphasis supplied.)

(*Tuggle v. Parker* (1945) 159 Kan. 572, 156 P. (2d) 533.)

In *Bruce Transfer Co. v. Johnson* (1939) 287 NW 278 the Iowa Supreme Court held that the trucks operated by the defendant transfer company constituted a "line

of cars" covered by a particular statute. The Court quotes the Century Dictionary as follows:

"A series of public conveyances, as coaches, steamers, packets and the like, passing to and fro between places with regularity." (Emphasis supplied.)

"'Stage line,' 'railroad line,' and 'automobile line,' are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points."

Commonwealth v. Walton (1907) 126 Ky. 523, 104 SW 323.

"In railroad parlance, 'a line' is an operating unit under one management over a designated way, or right of way."

Regenhardt Const. Co. v. Southern Ry. Co. (1944) 297 Ky. 840, 181 SW (2d) 441.

THE LAW.

We have no argument with any of the cases cited by appellees. Wherever they apply, appellants' position is sustained and appellees' position made untenable.

It is amazing that appellees rely so heavily upon *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158. This case substantiates all of the contentions of appellants to tax only the **average** property **wholly** within Louisiana as contradistinguished from attempting to tax the entire fleet.

The vessel taxation cases cited are not applicable here. The watercraft in the present cases is **never** entirely absent from Louisiana as in the case of individual ships or vessels, which visit for a fractional part of a year.

CONCLUSION.

Frankly, in the main, we are unable to understand appellees' argument. Generally speaking, it is not at all consonant with the admitted facts and the issues presented here.

Appellants have endeavored to reduce this problem to its simplest terms. We have shown the Louisiana Statute to be clearly constitutional, and therefore respectfully pray that the judgments of the Circuit Court of Appeals for the Fifth Circuit be reversed in each of these nine cases, and that judgment be entered in favor of the City of New Orleans and State of Louisiana, appellants herein.

Respectfully submitted,

BOLIVAR E. KEMP,

Attorney General of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

*City Attorney for the City of
New Orleans;*

HENRY B. CURTIS,

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ALDEN W. MULLER,

Assistant City Attorney;

HOWARD W. LENFANT,

Special Counsel;

Counsel for Appellants.

CERTIFICATE.

This is to certify that copies of this Brief have been served on opposing counsel on this the day of December, 1948.

Supreme Court of the United States

OCTOBER TERM, 1948.

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MAY IT PLEASE THE COURT:

AS TO THE JURISDICTION.

Appellees, at the Bar, asked for additional time to file another brief, but we find such supplemental brief to be simply repetitious of their previous argument.

Here again their analysis of the Court of Appeals decision and the effect thereof, is erroneous.

Reduced to its simplest terms, what the Court of Appeals said was that unless *all* of this watercraft was in Louisiana *at all times*, the State had no power to tax. Thus, that Court completely disregarded the tax apportionment principles upheld in so many cases for over half a century by this Court. And, in so doing they held the Louisiana tax apportionment statute unconstitutional.

Obviously, if Louisiana could only tax this watercraft if it was always in the State and only in that State, it would tax one hundred per cent of the property for it would have sole dominion over the entire property which could be taxed under the general tax laws of the State, the same as real estate, etc. A tax apportionment statute would be unnecessary.

But this Statute was designed to meet the exact situation as in the cases at Bar, and to provide a constitutional method of taxation in line with the principles laid down by this Court as to integrated *systems* of interstate transportation.

The Louisiana Statute specifically provides for the taxation of this portion of the fungible units of these inland water lines and when the Circuit Court of Appeals, as the basis for their decision, says that "this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways" [R. p. 112 (fol. 376)] they then, in effect, held this Louisiana Statute

repugnant to the Constitution of the United States. For the Circuit Court of Appeals decision to stand, would mean that Louisiana could never tax inland water carriers on the proportionate rule basis.

Under the Court of Appeals decision, *if it were admitted* that a daily average portion of this watercraft was in Louisiana throughout the year, the Court would have held "no taxing situs" because "this principle of apportionment has never been applied to watercraft using navigable inland waterways" and the exaction of taxes thereon violates the "due process of law" clause of the Constitution of the United States. Plainly, then, the present decision drains the life-blood from this Louisiana Statute and holds it repugnant to the provisions of the Constitution of the United States, for the very wording of the Statute calls for the application of the "principle of apportionment to watercraft using navigable inland waterways".

Could the effect of the decision be more plain?

Appellees likewise assert on page 6 of their original brief that the Statute is unconstitutional!

Appellees further admit on page 2 of their supplemental brief:

"The Court held that the taxes could not be exacted without violating the 'due process clause' because the property taxed had no taxing situs in Louisiana."

To hold such, is to declare the Statute unconstitutional! The lower Court held that to have a "taxing situs" *all* of the property must be *always* in Louisiana. This is to deny the tax apportionment principles which this Court has so clearly and positively enunciated over so many years.

Thus, appellees, in their argument, cannot or will not see the effect of the Court of Appeals decision. But it is clearly apparent for those who will see!

Appellees, in their confusion or distortion, insist on trying to inject the *DeBardeleben* case into this issue—the complete facts in that case being absolutely *dehors* this record. Again, in clarification, the decisions (68 Fed. Sup. 30—166 Fed. 2nd 509) show that as a matter of fact, *all* of DeBardeleben's (Coyle Lines) watercraft was found to be permanently in Louisiana, and this special tax apportionment Statute *did not apply*.

Regardless, therefore, of any erroneous interpretation appellees may seek to put upon the Court of Appeals decision, it speaks for itself.

Clearly, then, this Court has jurisdiction to determine these constitutional issues and the important Federal questions presented!

AS TO THE FACTS.

Here again, appellants are going to let the record speak for itself.

In line with the jurisprudence of this Court (as quoted in other original brief) for Louisiana to tax under its Statute, EITHER of two factual situations should exist; viz: a string of barges daily passing from one end of the State to the other, OR an average portion of this watercraft daily in Louisiana, throughout the year.

The record shows BOTH of these situations exist in the instant cases. In order for each of these Lines to average a tow to New Orleans once a week or oftener, there must necessarily be a long tow coming down the Mississippi River in Louisiana, while another is going up the River in Louisiana, thus passing each other in Louisiana. Because of their slow mode of travel, the down-bound tow and the up-bound tow must be traversing the several hundred miles of Mississippi River in Louisiana daily in order to make this average arrival at destination in New Orleans.

When each Line arrives in New Orleans, the towboat leaves all its barges there and then takes its other barges, which, had been waiting in New Orleans, on the up-bound tow and this process is repeated day in and day out, week in and week out, throughout the taxing year. Obviously, then, there is always an average portion of this watercraft daily in Louisiana, throughout the taxing year.

Appellees seek to point out the "time" spent by individual towboats in Louisiana as well as the "percentage of time"

spent by certain of this watercraft. Appellants could likewise point out in the record [R. pp. 69, 70 (fol. 311)] that certain *barges* spent months at a time in Louisiana without leaving. But this is not the important point in these cases. The decisive fact to consider is that these *Lines* are operating *daily* in Louisiana with an average portion of the watercraft daily in the State throughout the year.

Significantly, appellees only produced the time charts and graphs of their *owned* equipment, but not of their *leased* equipment used in their *lines*. Each line uses a great deal of leased watercraft [R. p. 61, (fol. 284)—R. p. 67 (fol. 308)—R. p. 71, (fol. 313)] and the Louisiana Statute specifically covers such leased equipment:

“(a) . . . All movable, and regularly moved . . . craft, barges, boats and similar things . . . *either owned or leased* for a definite and specific term stated and operated (such, illustratively, but not exclusively as . . . boats, barges and other watercraft and floating equipment of water transportation lines . . .)” (Act 59 of 1944 of the Legislature of Louisiana.)

Had appellees produced the graphs and charts also of their *leased* watercraft to show “percentage of time” in Louisiana, this Court could very readily see that the “percentage of time” of all this watercraft in Louisiana was larger than in any other State. New Orleans is the largest port on their Lines, and the place where their greatest volume of cargo is handled. (R. pp. 61, 65, 66, 69.)

But the "time" spent, as such, has never been the measure of apportionment, when tax apportionment has been levied upon the proportionate *mileage* basis, upheld so many times by this Court.

Mathematical exactitude has never been a constitutional requirement, and more especially in the instant cases when the record discloses that not one of appellees pays one cent of ad valorem taxes *anywhere* on this watercraft. [American—R. p. 62 (fol. 284)—Mississippi Valley—R. p. 65 (fol. 305)—Union—R. p. 73 (fol. 316).]

It is not at all necessary, however, to *consider* the *detailed* movement of a particular towboat or barge, when *each Line* admits its tows arrive in New Orleans, once a week or oftener, throughout the year. These are undisputed facts adduced from appellees themselves!

Contrary to what appellees believe the record discloses, each Line admits it runs on regular schedule to and from New Orleans and the northern termini—the American on regular schedule between Pittsburgh and New Orleans [R. p. 60 (fol. 282)]—the Mississippi Valley on regular schedule between Cincinnati and New Orleans [R. p. 69 (fol. 310)] and the Union on regular schedule between Pittsburgh and New Orleans [R. p. 71 (fol. 313)].

It makes no Constitutional difference that some particular towboat or barge was seldom in Louisiana or perhaps not at all. The Constitutional basis for the taxation is that these Lines are daily running in and out of Louisiana and an average portion of their equipment per-

manently within the State—not necessarily the same boat or barge—but a portion of fungible units of an integrated system of transportation.

Nor does it make any difference that one port may be on one side of a stream and a second port on the other. The route is fixed between the banks, of inland streams, and the route is as fixed and determined as it possibly could be. There is much more divergence in a railroad's operations, with its scores of switch-tracks to the sites of industrial plants, etc. Yet, for proportionate assessment purposes, the mileage is simply taken from the point where the railroad enters the State to its terminus within the State, or where it leaves the State.

This is exactly what the Statute calls for in the instant cases and the basis on which the assessments were made:

... "1. The portion of all of such property, of such person, firm or corporation shall be assessed in the State of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation." . . .
(Act 59 of 1944 of the Legislature of Louisiana.)

AS TO THE METHOD OF TAXATION.

This issue is not before the Court, for, as appellees are forced to admit, there are ample administrative remedies in Louisiana law to correct an erroneous or excessive method of assessment.

The agreed stipulation on pages 33 and 34 of the record (by which appellees are bound) is destructive of appellees' criticism of the method of assessment.

And as Mr. Justice Douglas said in *Butler Bros. v. McColgan*, 315 U. S. 501, 86 L. Ed. 993:

"One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed."

CONCLUSION.

The positive, admitted facts show the operations of these Lines in Louisiana to clearly come within the constitutional provisions, as laid down by this Court, to enable this State to collect its proportion of taxes.

The Louisiana Statute is therefore Constitutional and we respectfully pray that the judgments in these nine cases be reversed, and that judgment be entered in favor of appellants herein.

Respectfully submitted,

BOLIVAR E. KEMP,

Attorney General of Louisiana;

CARROLL BUCK,

First Assistant Attorney General;

HENRY G. McCALL,

*City Attorney for the City of
New Orleans;*

HENRY B. CURTIS,

First Assistant City Attorney;

ALDEN W. MULLER,

Assistant City Attorney;

HOWARD W. LENFANT,

Special Counsel;

Counsel for Appellants.

This is to certify that copies of this brief have been served on opposing counsel on this the day of January, 1949.

.....

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND
EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS,
ET AL.,

Appellants,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND UNION
BARGE LINE CORPORATION

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**STATEMENT OPPOSING JURISDICTION AND MOTION
TO DISMISS OR AFFIRM**

ARTHUR A. MORENO,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 244

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Appellants,

vs.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**STATEMENT OPPOSING JURISDICTION AND MOTION
TO DISMISS OR AFFIRM**

Appellees believing that the matters hereinafter set forth demonstrate the lack of substance in the questions raised by this appeal, file this statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their

motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Circuit Court of Appeal for the Fifth Circuit on the ground that the questions raised on behalf of appellants are so insubstantial as not to need further argument.

Jurisdiction is claimed herein under Section 240 of the Judicial Code, as amended (28 U. S. C. A. Section 347), which reads in part as follows:

“(b) Any case in a circuit court of appeals where is drawn in question the validity of a Statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, *and the decision is against its validity*, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case. (Italics supplied.)

“(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.”

It is to be noted that the above-quoted statute sets forth two requirements for an appeal. First, the decision of the Circuit Court of Appeals must have concerned the validity of a State statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States. Second, the decision of the Circuit Court of Appeals must have been against the validity of the State statute. It is well settled that a decision of a Circuit Court of Appeals merely *applying* a State law is not reviewable by appeal to the Supreme Court. *Baxter v. Continental*

Casualty Company, 284 U. S. 578 (1931); *Westling v. United States*, 288 U. S. 590 (1933). In the Statement as to Jurisdiction filed herein by appellants there is the following remark:

"The Statute of the Legislature of the State of Louisiana, whose provisions, in effect, have been held to violate the due process of law clause of the Constitution of the United States, is Act 59 of 1944"

We submit to Your Honors that even the appellants recognize the fact that these appeals do not come within the terms of the above-quoted section of the Judicial Code. The appellants have heretofore applied to this Court for a writ of certiorari which was, in due course, denied. As a last straw, they are now attempting to foist jurisdiction upon this Court even though they recognize, as indicated by the above-quoted portion of their Statement as to Jurisdiction, that the decision of the Circuit Court of Appeals in this matter did not deny the validity of Act 59 of the Louisiana Legislature for the year 1944.

The decision of the United States Circuit Court of Appeals for the Fifth Circuit, which is reported in 166 F. (2d) 509, did not turn upon a question of law, but turned upon a question of fact. The fact decided by the court was that the floating equipment of the three appellees did not have a taxing situs in the State of Louisiana, and, consequently, the State of Louisiana and its agencies were without power to tax. The court clearly stated the issue in the following words:

"The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there."

The court further found that the water equipment of the three appellees came into Louisiana in connection with in-

terstate commerce and remained there only long enough to accomplish the purposes of such commerce. The court further said, with reference to the three appellees, as distinct from the DeBardel ben Coal Corporation, the following:

“The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. Those turnarounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered by the interstate commerce operations in 1943, American’s towboats spend about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spend about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944, Union’s towboats spent about 2.2% and its barges about 4.3%.”

The Court of Appeals further said:

“The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans.”

The court then reviewed a number of cases and said:

“Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquire no tax situs in

Louisiana, and that no tax could be legally assessed and collected by that State or by the City of New Orleans”.

That the court based its decision on a question of fact must be clear from the recitation of what the Court of Appeals said. The conviction that the case turned upon a question of fact, and not upon a denial of principles of law, asserted by the petitioners here, is re-enforced by the fact that the court found that the property of the DeBardeleben Coal Corporation did have a taxing situs in the City of New Orleans. It did not deny to the appellants the application of the principles for which they contended, but, on the contrary, upheld the assessment made by the Louisiana Tax Commission on a proportionate basis, which assessed to the DeBardeleben Coal Corporation 25% of the value of all its watercraft. However, the United States District Court found, and the United States Circuit Court of Appeals affirmed the finding that, in the assessment, had been included barges in Alabama which had never been within the taxing jurisdiction of the State of Louisiana. If the court had denied to the appellants the application of the principles for which they contended, it would have decided against the appellants in favor of the DeBardeleben Coal Corporation, but, instead of so deciding, it remanded the DeBardeleben Coal Corporation case to the United States District Court to correct the assessment by the excision of the value of the barges in Alabama. It must, therefore, be clear that these cases turned upon questions of fact. In the case of the appellees here, the facts of no taxing situs were found in favor of the appellees. In the DeBardeleben Coal Corporation case, the court found in favor of the appellants and held, as a matter of fact, that the property of the DeBardeleben Coal Corporation did have a taxing situs in Louisiana. It impliedly sustained the

method of assessment as to the equipment with taxing situs in Louisiana, but remanded the case only to eliminate barges in Alabama and never in Louisiana.

Because the question has been clearly and unqualifiedly decided against the appellants here, the appeals offer no substantial question for decision by this Court.

WHEREFORE, appellees respectfully submit this statement to show that the questions upon which the decision of this case depends are so insubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or, in the alternative, to affirm the decree entered below.

July 26, 1948.

(S.) ARTHUR A. MORENO,
*Attorney for Mississippi Valley Barge Line
Company, American Barge Line Company and
Union Barge Line Corporation, Appellees.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC
FINANCE AND EX-OFFICIO CITY TREASURER
OF THE CITY OF NEW ORLEANS, ET AL.,

Appellants,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND
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Appeal from the United States Circuit Court of Appeals
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BRIEF IN SUPPORT OF MOTION TO DISMISS
OR AFFIRM.

ARTHUR A. MORENO,
Counsel for Appellees.

LEMLE MORENO & LEMLE,
(Of Counsel).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

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Appellants,

versus

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AMERICAN BARGE LINE COMPANY AND
UNION BARGE LINE CORPORATION.

Appeal from the United States Circuit Court of Appeals
for the Fifth Circuit.

**BRIEF IN SUPPORT OF MOTION TO DISMISS
OR AFFIRM.**

May It Please the Court:

A motion to dismiss or affirm has heretofore been made. The motion shows that there is no substantial Federal question involved. The statement in the brief of appellants that they are entitled to an appeal as a matter

of right, is refuted, not only by analysis, but by the action of this court in these very same cases heretofore taken.

The present appellants filed an application for a writ of certiorari to review the very judgments which are at issue here. The application for writs of certiorari were Numbers 818, 819, 820, 821, 822, 823, 824, 825 and 826 of the docket of this Honorable Court, October Term, 1947. The application for writs of certiorari were denied in these cases on the 21st day of June, 1948. If there had been any merit in the claim here made of a substantial Federal question wrongly decided by the Circuit Court of Appeals, writs of certiorari would have been granted on the applications heretofore made. The very fact that these applications were denied is the best argument in support of the contention of the various taxpayers that there is no substantial Federal question presented.

The claim of a right to an appeal is based upon § 240 of the Judicial Code, as amended, (28 U. S. C. A. § 347). The right to an appeal rests upon the contention that there was drawn in question the validity of a statute of Louisiana repugnant to the Constitution of the United States, and the decision was against its validity. We challenge the statement that the Circuit Court of Appeals denied the validity of Act 152 of 1932, as amended by Act 59 of 1944, by virtue of which these taxes were imposed. We say, unqualifiedly and unequivocally, that the United States Circuit Court of Appeals did not decide that the statute was invalid, but, on the contrary, upheld the validity of the statute by making it applicable to the DeBardeleben Coal Corporation, *Ott, Commissioner of Finance, v. DeBardele-*

ben, 166 Fed. (2) 509, which was a companion suit to the suits which are sought to be reviewed here. In the *DeBardeleben Coal Corporation* case, it held that the water equipment of the DeBardeleben Coal Corporation had a taxing situs in Louisiana, and, consequently, its property was subject to the taxes imposed by Act 152 of 1932 as amended by Act 59 of 1944.

If the Circuit Court of Appeals had decided against the validity of the act, it would have automatically upheld the contention of the DeBardeleben Coal Corporation that the taxes were unconstitutionally collected. It, however, held that a part of the taxes imposed under the act were constitutionally exacted, but remanded the case to the United States District Court for the excision from the assessment of property located in Alabama and never within the taxing power of Louisiana.

However, the position of the various appellees is not dependent upon a historical recital of the litigation, but is supported by an analysis of the judgments under attack. The United States Circuit Court of Appeals clearly stated the issue which it decided in the following words:

"The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there".

The Court of Appeals further said:

"The court below found from these facts that the tugboats and barges of American, Mississippi and Union were never permanently within the State of

Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans".

The Circuit Court of Appeals then reviewed a number of cases decided by this Honorable Court and said:

"Applying these legal principles to the facts of this case we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans".

It did not hold that the Legislature of Louisiana in passing the statute under consideration had violated the prohibitions of the Constitution of the United States. On the contrary, it held, in the *Debardeleben Coal Corporation* case, that there had been no violation, since it upheld the exercise of the taxing power under the statute under consideration. Reduced to its lowest level, the contention made by the appellants is that regardless of taxing situs, the State of Louisiana may impose a tax on any watercraft which comes into the State, based upon the percentage of mileage traveled within the State and the percentage of mileage traveled without the State. Reduced to its ultimate terms, the contention is that because the Circuit Court of Appeals held that the State of Louisiana could not tax watercraft coming into the State in connection with interstate commerce, if such watercraft had not acquired a taxing situs in the State of Louisiana, that, therefore, the Circuit Court of Appeals held the statute to be unconstitu-

tional. Certainly, any statute that would attempt to tax watercraft coming into the State of Louisiana for one or two days out of a year would be unconstitutional. Certainly, no substantial Federal question is presented by such a contention, because it is inconceivable that this Court would hold constitutional a statute having that intention and purpose and so applied. If such a statute when so applied could be held to be constitutional, it would result that at any time any watercraft entered any state for one or two days, it would become subject to taxation by that state on the basis of mileage traveled within the state. It is hardly believeable that anyone would contend for the validity of a statute intended to tax interstate commerce in so fantastic a fashion. If such be the basis of the contention, it presents no substantial Federal question.

We appreciate that the resolution in the test-tube of logic of the contention advanced by the appellants produces a wholly distasteful potion. However, in legal principle, there is no escape from the substance of the contentions made by the appellants. The contention of the appellants finds its basis in the statement of the United States District Court in its conclusions of law, wherein it was said:

"The continued retention of any of the aforementioned illegal taxes, paid under protest by the respective parties in interest, constitutes a taking of property without due process of law, in violation of the Federal and State Constitutions".

The statement in the brief of appellants confuses the judgment which this Court is called upon to review.

The quotation is from the opinion of the United States District Court, but is not contained in the opinion of the United States Circuit Court of Appeals. The fact that that court affirmed the judgment of the District Court is no warrant for contending that the reasoning of the one court was precisely the reasoning of the other court. However, even if the quotation were the expression of the United States Circuit Court of Appeals, it should not further the cause of the appellants. The United States District Court held in effect that the statute could not have application to property not within the taxing power of the State. It did not hold, nor even suggest, that where property has a taxing situs in Louisiana, that the Legislature acted unconstitutionally in adopting a method of taxation for property within the sovereign power of the State. It in effect held that the statute could not apply to property which had a taxing situs respectively in Delaware and Pennsylvania. The gulf of difference from holding a statute unconstitutional and holding it inapplicable to a given set of facts must be clearly discernible.

It is said in the brief of appellants the following:

"Had the Circuit Court of Appeals *applied* the State law here, it would have resulted in *judgment* for the *appellants* instead of the appellees; instead the Circuit Court of Appeals, in effect, held the State Statute repugnant to the Constitution of the United States. The statute in question (Act 59 of 1944 of the Legislature of Louisiana) specifically sets forth that interstate carriers, such as appellees herein, who run their lines within Louisiana, shall be as-

essed on a proportionate mileage basis, Section 5, Paragraph 'g' of said Statute reading as follows:

'(g) "For the purpose of such valuation, assessment and taxation in Louisiana, such parishes and municipalities shall be hereby fixed and declared, respectively, *to be a taxable situs in this state* of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said tax-payer be a *resident or a non-resident* of Louisiana and *irrespective of whether or not here domiciled locally or otherwise.*" (Emphasis supplied.)'

"Thus, it is clearly seen, that had the Circuit Court of Appeals applied the State Statute they would have necessarily found for appellants herein; they could not have done otherwise. It will be noted that there is no provision whatsoever in the Statute in question which allows for a Court to first find that the barges and tow-boats have a taxing situs in Louisiana. If such a condition precedent had been contained in the Statute, then appellees' position here may have been on a more sound basis. The Statute unequivocally fixes the taxing situs in Louisiana for the portion of the property sought to be taxed, whether the said tax payer be a resident or a non-resident of Louisiana and irrespective of here domiciled locally or otherwise".

The contention which emerges from the quotation is not only novel, but startling. It advances a taxing

theory that any state might declare property to have "a taxable situs in this state", regardless of whether as a matter of fact it does have a taxing situs. It is contended that there might be substituted for the constitutional fact of situs, the fiction generated by legislative enactment. It must be apparent that if the State of Louisiana passed a statute which by fiat made watercraft taxable in the State of Louisiana regardless of situs, that the statute would be wholly unconstitutional. If that be the ultimate contention, then, no serious or substantial Federal question is presented, because this Court has, on numerous occasions, under the guidance of long recognized taxing principles, held that in order for a state to tax property, such property must be, as a matter of fact, incorporated within the mass of property in the state so as to have a taxing situs. The principles are fixed, but the facts are flexible, and the decision in each case depends upon the conclusions from the immediate facts. The decision in this case turned not on the invalidity of the statute, but on the facts and its inapplicability to the facts.

Counsel, in their brief, say that the Circuit Court of Appeals was without right "to first find that the barges and towboats have a taxing situs in Louisiana".

It is urged that Louisiana by its statute has not made it a condition for the imposition of the tax that the court should first find that the property has a taxing situs in Louisiana. Inherent in the statement is the contention that a court of law is without right to first ascertain whether property taxed is subject to the taxing sovereignty of a state. Cognate to the contention is the argument that the Circuit Court of Appeals should have blindly ap-

plied the statute to any property coming within the State of Louisiana, regardless of the time spent in Louisiana by such watercraft. Extruding from the brief of the appellants is that the United States Circuit Court of Appeals should have ascertained if any of the watercraft of the appellees had come into Louisiana, and if it had come even for a day, the tax should be assessed against such watercraft on the basis of mileage within the state and the mileage without the state, and the facts and principles of taxing jurisprudence should be discarded and there should be a blind adherence to the statutes of Louisiana, regardless of the fact that such statutes were not born of the sovereignty of the State, but were produced in defiance of the Constitution.

There is the implication in the brief of the appellants that the State of Louisiana has the power to fix the taxing situs of property. The import of the contention is that the power to declare the situs of property for taxing purposes is absolute. The suggestion of the contention is that the facts of situs are immaterial, but the power of declaration by the State of Louisiana is supreme. The statements here made find their roots in the contention of the appellants as follows:

"This Statute fixes the situs in Louisiana of a portion of appellees' property. To therefore hold that this property has no taxing situs in Louisiana is to deny the validity of the Statute!

"It is admitted that these private barge-lines run continually and constantly throughout the year in Louisiana, and they clearly come within the provi-

sions of this Statute; to hold that Louisiana cannot collect these taxes is to decide against the validity of a State Statute. This is so apparent from the reading of the Statute, and the provisions of the Judicial Code giving this Court jurisdiction, that it should admit of no further argument".

The quotation is correct in saying that the contention of the appellants admits of no argument. The mere statement of the contention refutes the need of argument and causes the contention to fall of its own weakness. The record shows that the property taxed does not continually and constantly, throughout the year, come into Louisiana. The record, on the contrary, shows that some of the watercraft which forms the basis of the assessment came into Louisiana at irregular intervals, and remained for varying periods, while some of the other property which forms the basis of the assessment never came to Louisiana within the taxable year. The soul of the argument is that if a tow-boat or barge came into Louisiana at any time, that the Legislature had the power to declare such equipment to have a taxable situs in Louisiana, regardless of the fact that such equipment might stay but a day. To hold that such equipment is beyond the reach of the taxing power of the State of Louisiana is not to hold invalid the statute when applied to facts of taxation which the statute could validly reach. To say that the Circuit Court of Appeals went beyond the provisions of the statute, and contrary to the statute, found that the property was not subject to taxation is to argue that the property of the appellees is beyond the protection of the Constitution, because the State of Louisiana had given such property a fictive situs in Lou-

isiana. To so argue is to assert that the courts of the United States are without power to apply the constitutional protection to the property of the citizen, because the State of Louisiana declares that property having a non-taxable situs in Louisiana does have such a situs.

The statute, of course, is not necessarily invalid, because it is conceivable that it has application in a constitutional area. For example, the United States Circuit Court of Appeals found that the DeBardeleben Coal Corporation had a factual situs for taxation in New Orleans, and, consequently, applied the statute. The application of the statute in that case was the convincing evidence that the United States Circuit Court of Appeals did not hold the statute invalid or unconstitutional, because had it done so, it would have rendered a judgment in favor of the DeBardeleben Coal Corporation, instead of giving judgment against it for the taxes collected on the property having a situs in Louisiana. It is, therefore, urged that the State of Louisiana is without power to give a taxing situs to property when the facts, tested by the law of taxation, show its situs to be elsewhere than in Louisiana. It is submitted that the United States Circuit Court of Appeals did not decide against the validity of the statute, but, on the contrary, applied it in what it conceived to be a proper case for its application. It is submitted that if the contention of the appellants is that the State of Louisiana has the right to tax property which comes into the State for a single day, merely by the declaration of situs, that no substantial Federal question is presented based upon such a contention. The law as pronounced by this court is that there must be an actual situs for purposes of taxation, and

that the fiction of situs is no substitution for situs. The declaration of this principle has been so unqualified and so often reiterated that the question is neither open for discussion nor decision and, consequently, the assertion of a contrary principle, based upon fiction, presents no serious or substantial Federal question.

Respectfully submitted,

ARTHUR A. MORENO,

Counsel for Appellees.

LEMLE MORENO & LEMLE,

(Of Counsel).

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SUPREME COURT OF THE UNITED STATES

No. 244

OCTOBER TERM, 1948.

LIONEL G. OTT, COMMISSIONER OF PUBLIC FI-
NANCE AND EX-OFFICIO CITY TREASURER OF
THE CITY OF NEW ORLEANS, ET AL.,
APPELLANTS,

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND
UNION BARGE LINE CORPORATION

Appeal from the United States Court of Appeals for the
Fifth Circuit

BRIEF ON BEHALF OF APPELLEES

ARTHUR A. MORENO,
Attorney for Appellees.

SELIM B. LEMLE,
LOUIS G. LEMLE,
(Of Counsel).

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LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS, ET AL.,
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versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY AND
UNION BARGE LINE CORPORATION

Appeal from the United States Court of Appeals for the
Fifth Circuit

BRIEF ON BEHALF OF APPELLEES

May It Please the Court:

This matter comes before the Court on the appeal of Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans, and George Montgomery, State Tax Collector of Louisiana for the Parish of Orleans, to review judgments rendered

against each in favor, respectively, of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation for the refund of ad valorem taxes for the years 1944 and 1945. The causes were tried in the United States District Court for the Eastern District of Louisiana, which rendered judgments in favor of each of the appellees for the amount of taxes claimed by each for the respective years. (R. 31).

On appeal to the United States Circuit Court of Appeals (Fifth Circuit), the judgments in favor of each of the plaintiffs in those suits, appellees here, were affirmed and it is from these judgments affirming the judgments of the United States District Court that appeals have been made to this Court. The basis of the appeals is that the United States District Court and the United States Circuit Court of Appeals (Fifth Circuit) held the statute under which the taxes were alleged to have been assessed to be unconstitutional. The appellees starkly deny that the United States Circuit Court of Appeals declared the statute, under which the taxes were assessed, as unconstitutional. (Act 152 of 1932, as amended by Act 59 of 1944).

Statement of the Case

The first two appellees were incorporated under the laws of Delaware, while the third is incorporated under the laws of Pennsylvania. Each one is engaged in transportation in interstate commerce from points on the Ohio River and the Mississippi River to New Orleans, Louisiana, and to points in Texas. The taxes levied under the act are ad valorem taxes on the towboats and barges of the

respective corporations. These towboats and barges are concededly engaged exclusively in the transportation of interstate commerce. The United States District Court and the United States Circuit Court of Appeals each found

at the towboats and barges came into Louisiana for the purposes of interstate commerce, and remained within the State only a sufficient length of time to enable the cargoes to be unloaded and to load cargoes for transportation to states other than Louisiana. The courts held that there was no intent that this water equipment should remain in Louisiana, so as to acquire a taxing situs by being incorporated into the mass of property of the State, nor did either court find that, regardless of intent of the appellees, that such watercraft was permitted to remain in Louisiana sufficiently long to be incorporated into the mass of property in the State, and thereby acquire a situs for local taxation. Neither court held that statute under which the taxes were assessed as unconstitutional because violative of the "due process clause" of the Fourteenth Amendment, nor unconstitutional because of operating within the prescriptive area of interstate commerce.

The appeals in these cases have been taken upon a misapprehension as to the holding of the United States District Court and of the United States Circuit Court of Appeals. This misapprehension is demonstrated with mathematical precision by the history of the litigation.

At approximately the same time that suits were filed on behalf of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation, there was also a suit filed on be-

half of the DeBardeleben Coal Corporation, which was incorporated under the laws of Delaware. The same grounds of unconstitutionality as was urged in these cases was urged in the case of DeBardeleben Coal Corporation. The United States District Court found, in favor of the DeBardeleben Coal Corporation, that the assessment upon which the taxes were based was invalid, as distinguished from unconstitutional, because there had been included in the assessment property situated in Alabama and which had never been in Louisiana, and, consequently, had not been within the taxing reach of the State of Louisiana. Impliedly, it upheld the constitutionality of the statute, but decided in favor of the DeBardeleben Coal Corporation because of an invalid method of assessment under a constitutional statute.

On appeal, in the case of DeBardeleben Coal Corporation, which was consolidated with the cases before this Court, it was argued as involving the same principles of unconstitutionality. The Court of Appeals held that the assessment was not void in whole, but was void in part, because of the inclusion of property located permanently in Alabama with property in Louisiana as the measure of the assessment. It remanded the case to the United States District Court for the purpose of excising the property in Alabama from the assessment, and decreed that taxes based upon property in Louisiana should be the measure of the tax. Both the United States District Court and the United States Circuit Court of Appeals found that although the Debardeleben Coal Corporation was a Delaware corporation, that its property had acquired a situs for taxation in Louisiana and, therefore, that Act 152 of

1932, as amended, was applicable and controlling when properly applied.

Indisputably, if it had held that the act here under review was unconstitutional when applied to the property of the DeBardeleben Coal Corporation, having a situs in Louisiana, it would have affirmed the judgment of the United States District Court. When it remanded the case of the DeBardeleben Coal Corporation to the United States District Court, it thereby declared it subject to the statute and thereby recognized the vitality of the statute, and, consequently, did not declare it unconstitutional.

It must follow as a matter of law and logic, that the statute could not be constitutional as applied to the property of the DeBardeleben Coal Corporation, having a situs in Louisiana, and yet be unconstitutional when applied to the property of the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation. The differentiation between the three latter corporations and the DeBardeleben Coal Corporation rested, not upon the nullification of a statute as being in violation of the Fourteenth Amendment, or as offending the Commerce Clause, but rested upon a difference of fact between property having a situs in Louisiana and property having a situs beyond the sovereignty of Louisiana. Unquestionably, if and when the statute again in another case comes before the United States Circuit Court of Appeals for the Fifth Circuit, it will again uphold its constitutionality and will apply the statute if it finds that property assessed thereunder has a

situs in Louisiana. If the American Barge Line Company, the Mississippi Valley Barge Line Company and the United Barge Line Corporation should permit their towboats and barges to remain in Louisiana, so as to acquire a taxing situs, the statute will be applied. *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299. The conclusion is inescapable that the appeal in this case does not lie, when based upon the ground that a state statute has been declared unconstitutional.

However, pretermittting whether an appeal lies because the Court of Appeals did or did not hold the statute unconstitutional nevertheless tested by the jurisprudence of this Court, the statute is unconstitutional.

The Appellants Assign as Error: (R. 127)

1. The Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisiana to collect its share of the taxes on these towboats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

2. The Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

3. The Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in

which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

4. The Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

5. The Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of-law clause of the 14th Amendment of the Constitution of the United States.

6. The Circuit Court of Appeals erred in holding for respondent barge lines in these cases decreeing these taxes illegal and invalid.

The clear and unequivocal answer to the statement of error is that the Court of Appeals did not err in holding the statute unconstitutional, because it did not declare it unconstitutional but applied its terms to the DeBardeleben case.

The Pleadings

The plaintiffs invoked §1 of the 14th Amendment to the Constitution of the United States, and Art. 1, §2 of the Bill of Rights of the Constitution of Louisiana as taking the property of plaintiffs without due process of law, and also the exaction of said taxes as unconstitutional because violative of Art 1, §8 of the Constitution of the United States as being a tax on interstate commerce. The invocation of these constitutional provisions was based upon the fact that the towboats and barges of the respec-

tive plaintiffs had no taxing situs in Louisiana, and that the method of taxation was arbitrary and capricious and rested upon no principles of taxation as to the valuation of property, and so amounted to a taking of property without due process of law. The plaintiffs claimed a refund of taxes paid by each because unconstitutionally exacted.

All of the complaints set out substantially the same cause of action, and are virtually the same, except for the natural differences between the status of the plaintiffs and the amounts sued for. Each alleged that the Louisiana Tax Commission is a body created under the laws of the State of Louisiana for the purpose of fixing assessments on property having a situs in Louisiana and subject to the taxing power of the State.

Each alleged that it is engaged in the business of transporting merchandise and cargoes of various kinds in interstate commerce between ports variously situated in Pennsylvania, Ohio, Kentucky, Florida, Mississippi, Louisiana, Texas and other states; that in connection with its business, each owns and operates certain towboats and barges in the business of interstate transportation upon the navigable waters of the United States; that its towboats and barges are engaged continuously in the transportation in interstate commerce between the City of New Orleans and various ports on the Mississippi River and other rivers, and that these towboats and barges are only at times within the State of Louisiana for the sole purpose of either loading or unloading cargo, or passing through on interstate voyages; that the Louisiana Tax Commission has assessed the property of each as located in,

or having its situs, either legally or actually, in the State of Louisiana.

Each alleged the Louisiana Tax Commission has assessed the towboats and barges of each on a mileage basis, proportioned to the number of miles assumed to have been traversed by said equipment in Louisiana, and assumed to have been traversed in other states, notwithstanding the Louisiana Tax Commission had, and has, no knowledge of the number of miles traversed by such equipment within and without the State of Louisiana; that in making the assessment, it did not know whether all of the towboats and barges of each had come into the State of Louisiana during the year of the assessments, and had never inspected, or viewed said watercraft to fix the value thereof, but had assumed an arbitrary value for each towboat and barge, and by giving to all of the watercraft equipment of each plaintiff an arbitrary value, had allocated a percentage of such value as the basis of the assessments of the respective plaintiffs, and that such assessments were arbitrary and capricious, because based upon no known fact of value.

The Facts

The facts are clearly and forcefully summarized as to the operations of the three appellees in the findings of the United States District Court upon which was based the judgment in favor of the appellees. (R. 30).

"(1) The American Barge Line Company, which will hereafter be referred to simply as American, while the names of the remaining three plain-

tiffs, for the like reason of brevity and convenience, will be written: Mississippi Valley, Union and DeBardeleben, respectively, is, as previously stated, a Delaware corporation, and so are Mississippi Valley and DeBardeleben. None of the stockholders of either American or Mississippi Valley reside in Delaware, and the great majority of the DeBardeleben stockholders are likewise non-residents thereof. None of the officers and directors of either of said three named [fol. 230] corporations reside in Delaware, but the designated agent of each for the service of process in that State, Trust Corporation of Delaware, is there domiciled.

Union is a corporation organized and existing under the laws of Pennsylvania, with its domicile in the City of Pittsburgh, said State, where it maintains its principal business office.

Each of the four named corporations are lawfully engaged in transportation of freight upon inland waters of the United States, under authority of a certificate of public necessity and convenience issued to each by the Interstate Commerce Commission.

The "taxed" towboats of American and DeBardeleben are enrolled under the United States shipping regulations pertaining to vessels engaged in domestic commerce (Title 46, Chap. 12, U. S. C. A.) at Wilmington, Delaware, and there, too, they have voluntarily registered their barges; while the towboats of Union are enrolled at Pittsburgh, and the watercraft of Mississippi Valley are enrolled at

St. Louis, Missouri. But this has little or no bearing as concerns the place of taxation. (51 Am. Jur. (1944), 913, pp. 807-809).

Under neither Delaware nor Pennsylvania law, is such marine equipment as is used in interstate commerce by American, Mississippi Valley, DeBardeleben, and Union, respectively, subject to state taxation.

(2) The towboats of American regularly operate between Pittsburgh and New Orleans, and occasionally make a trip from St. Louis to New Orleans. Its barges ply on the Mississippi and Ohio Rivers, between Pittsburgh and New Orleans, and up the Cumberland, the [fol. 231] Tennessee, the Monongahela and Kanawha Rivers, they operate, also, between Pittsburgh and Palmyra, Arkansas, and on the Intracoastal Canal.

Steel products originating in the Pittsburgh territory generally compose the downstream cargoes of American, whether destined for, say, Louisville, Kentucky, Memphis, Tennessee, New Orleans, on the Mississippi River or Houston, Texas, on the Intracoastal Canal.

American has no warehouse at New Orleans, no stevedoring department, and operates no terminal there, as it does at Glassport, Pennsylvania, and at Louisville and Memphis, respectively. In its operations beyond New Orleans, it transfers loaded barges to the motive power of like water transportation services.

All of its downstream tows it delivers to Whiteman's Landing, Algiers, on the west bank of the Mississippi, in New Orleans, and from this point leaves on all of its upstream return trips.

Cargo consigned to New Orleans is then transferred from Whiteman's Landing to city docks (at whatever space thereon indicated by the respective consignee) and there unloaded by Mississippi Valley, under an arrangement between it and American, but when a particular cargo is destined for a point beyond New Orleans, the carrying barge or barges are picked up at the Landing by a vessel making the Intracoastal canal trip towards Houston, for instance, or, perhaps, by one proceeding further down the Mississippi to Port Sulphur or other nearby river point; none of which, American owns or operates.

[fol. 232] In the steady flow of interstate commerce so moved by American as far south as New Orleans, several towboats and many barges are used. One towboat may start a trip from Pittsburgh only to be substituted by one or more towboats on the way south, and some or all of the loaded barges making up the initial tow may be delivered to consignees at intervening ports, such as Louisville, Memphis, and Palmyra, Arkansas, to be replaced by loaded barges there awaiting transportation downstream, so that no special towboat or barge is allocated to service on any particular leg of the voyage, and barges are made available as and where tonnage is offered for transportation. The

tow load on any trip is always maintained, as nearly as practicable, of such number of barges and cargo weight, as insures the towboat's pushing ahead at maximum efficiency.

All of the foregoing holds true, likewise, on return or upstream trips from New Orleans.

No towboat is permitted to remain in port any longer than is necessary to deliver cargo and to take on barges; at New Orleans, no longer than it takes to break up the downstream tow at Whiteman's Landing, and to then make up a tow for the return trip up the Mississippi.

There is sometimes a slight delay awaiting the delivery of loaded barges for the return trip, because seldom are empties towed upstream but some are sent down to New Orleans to load northward-bound tonnage offered. But consistent effort is made to expedite all return trips, inasmuch as it is only by keeping the watercraft on the move that money is made, as American's acting superintendent of transportation expressed it in testifying.

[fol. 238] Petroleum products, in the main, constitute American's upstream tows, although there are cargoes of alcohol and sugar. These cargoes are assembled at Whiteman's Landing, delivery being effected there from Texas and Louisiana points, for their inclusion in American's upstream operations.

American, by means of its wholly-owned subsidiary Jeffersonville Boat and Machine Works,

with plant located at Jeffersonville, Indiana, across the Ohio River from Louisville, Kentucky, where American maintains its chief business office, employing no less than 25 persons, does all general repair and overhaul work upon its marine equipment, but emergency repairs on a trip are necessarily done at the nearest boatways available.

In 1943 and 1944 American maintained a constant heavy traffic to and from New Orleans. It owned slightly less than 200 barges and 10 towboats, 9 of which were kept in operation, but 4 of them never came to New Orleans, and neither did some of its barges, but others did come rather constantly. In 1944 American added, under charter from the Defense Plant Corporation, 4 towboats and 40 barges to its marine equipment so being used in interstate commerce.

In 1943, American's total tonnage loaded and unloaded at various ports of call was 977,705.57 tons, 72,504.61 of which were loaded on at New Orleans, and 33,647.77 unloaded. In addition to this, there were assembled at Whiteman's Landing for American's upstream tows 18,732.63 tons, loaded at two points south of New Orleans, and 120,973.62 tons loaded at Intracoastal Canal points all the way to Houston, Texas. The total loadings leaving New Orleans in American's upstream traffic aggregated, therefore, 212,210.86 tons of the total tonnage transported in 1943, [fol. 234] or about 22% thereof. The actual loadings at New Orleans approximated 7%. (Exhibit No. 5).

Of the total time covered by their interstate commerce operations of 1943, American's towboats spent no more than approximately 3.8% thereof within the boundaries of Louisiana:

Only five of its own tow boats moved in and out of the State, to which must be added the Java Sea, taken over, under charter, on November 24, 1943.

The schedule of time spent at the Port of New Orleans by American's said five vessels during that year shows the following state of facts, viz:

The 'Jefferson' was in one or more Louisiana ports, in all months except February and April, for a total of 33 days, 7 hours, and 45 minutes, 24 hours, 7 hours, and 30 minutes of which were spent in making repairs, leaving 9 hours and 15 minutes for the vessel's usual activities such as dropping and picking up barges, taking on supplies, water, fuel, pumping out barges, etc. (Italics by the Court).

The 'National', in 6 months, i. e.:—April, June, August, September, October and November, for 9 days, 3 hours, and 15 minutes,—4 days, 4 hours, and 45 minutes thereof in making repairs; thus leaving but 4 days, 22 hours and 30 minutes for all other purposes.

The 'Patriot' in 6 months, i. e.:—April, May, June, July, August and September, for 11 days, 10 hours, and 15 minutes,—7 days, 23 hours,

and 15 minutes thereof in making repairs; leaving 3 days and 11 hours for all other purposes.

[fol. 235] The 'Pioneer', in each of the 12 months, for 49 days, 7 hours, and 5 minutes,—24 days, 13 hours and 45 minutes in making repairs; leaving 24 days, 17 hours, and 20 minutes for all other purposes.

The 'Progress', in 8 months, i. e.:—February, March, April, June, July, October, November and December for 22 days, 3 hours, and 15 minutes,—15 days, 18 hours and 10 minutes thereof in making repairs; leaving 6 days, 9 hours and 5 minutes for all other purposes.

In 1944, American made 73 such 'in and out' trips, having chartered four more Defense Plant Corporation power vessels, and some forty odd barges, for use in its interstate commerce transportation service.

While in port at New Orleans, American's marine equipment has the benefit of such fire protection as is afforded all wharves, whether publicly operated at dock charges or privately maintained upon leased banks, all watercraft moored to any of said wharves; as well as of harbor police surveillance, and of all sanitary regulations of State and City Boards of Health; but this presents no more favorable situation, so far as concerns American's interest, than exists in all like river ports which it serves, except that the Dock Board does operate two fire tugs, one of which helped to quench a fire

on the towboat 'Pioneer', in 1943, when the whole of that vessel's galley burned; which necessitated the vessel's remaining in port for 24 days thereafter, in order to effect the galley's replacement before commencement of the usual journey with a tow.

The same benefits are likewise shared by Mississippi Valley, Union and DeBardeleben, to greater or lesser degree, dependent upon their movements in and about the Port of New Orleans.

[fol.236]. American never engages in Louisiana intrastate commerce operations; nor do Mississippi Valley, Union and DeBardeleben.

(3) Mississippi Valley owns 80 barges and 4 towboats, i. e. the Ohio, Indiana, Tennessee, and the Louisiana, with which it ordinarily carries on its interstate commerce transportation as a public carrier, but as increased volume of tonnage is offered at times, or in other like contingencies, temporarily chartered towboats and barges are added to the working fleet. Considering the overall period, an average of 2 to 3 towboats were so chartered and operated in 1943, and, in like manner, barges to the number of slightly less than the 80 barges owned.

No fixed number of barges or towboats, nor particular barges or boats, as such, are ever allocated to any special area within the territory covered by Mississippi Valley's water transportation operations, which begin at Pittsburgh, on the East,

at St. Louis, on the west, and continue downstream to New Orleans, serving all intervening ports, including Cincinnati, Ohio, Evansville, Indiana, Louisville, Kentucky, Cairo, Illinois, Memphis, Tennessee, Vicksburg, Mississippi, and Baton Rouge, Louisiana.

Besides maintaining this regular water transportation service, Mississippi Valley also operates, on occasion, as far north as Minneapolis and on some of the tributaries of the upper Mississippi.

Usually, such barges as are unloaded at any point in discharge, are loaded at once with cargo offered for transportation, to be picked up by the next upstream or downstream tow passing by; but when it is known in advance that surplus tonnage awaits transportation on an outbound trip, all available extra equipment is dispatched to that particular [fol. 237] terminal. Whenever empties are on hand because of lack of cargo offered, and as a passing tow is sufficiently light to profitably haul the barges to other points in need of them, they are so transferred; this is done, for instance, whenever movement of cargo into New Orleans, for any period, consistently exceeds the quantity carried out on return trips northward. Depending upon the season of the year, this process is reversed, at times.

Simply stated, boats and barges are supplied to move cargo whenever offered—no particular tow-boat or barge—the quantity and kind of cargo indicating however, whether large or small barges, or open or closed barges, are needed.

The sole and only purpose of Mississippi Valley's watercraft coming into Louisiana, past Baton Rouge into New Orleans, from which terminal point such towboats and barges return northward, is to deliver cargo carried in interstate commerce from out of Louisiana to Louisiana points north of New Orleans, and to the Port of New Orleans. A constant water transportation service is maintained and in 1943,—as it has been in all of the past several years,—Mississippi Valley tows arrived at New Orleans once a week or oftener. No barges are ever picked up at Baton Rouge or other Louisiana point for delivery to New Orleans, for any Louisiana port. Loaded barges in a downstream tow are dropped at Baton Rouge, where they remain until unloaded and picked up loaded or empty on the next succeeding return trip northward. Occasionally, as required for loading surplus tonnage offered, empties are dropped at Baton Rouge. No towboat remains at that port any longer than is necessary to tie off or pick up a barge.

[fol. 238]. Mississippi Valley's towboats do not travel the same route with regularity and, for instance, during a given period one or more of the boats may not come down the Mississippi as far as New Orleans, while one or more are repeating trips to the port without interruption; and barges made up in a tow, either at Pittsburgh or St. Louis, may all be dropped at intervening river points, as other loaded barges are picked up to replace them, so that the delivered tow at New Orleans may be one that

has been wholly made up en route and is being pushed by other than the boat that started out on the downstream towing trip.

It is the constant aim of Mississippi Valley to unload cargo at point of destination without delay and to immediately re-load the emptied barge with available outbound cargo, so that the same may leave port on the first return trip if the loading is complete, or not later than the second, if not. When a tow reaches New Orleans, or other like terminus, the inbound tow is tied off in two units, the towboat takes on fuel, picks up the loaded outbound tow which awaited its coming, and immediately proceeds out of port. On occasion, however, because of limited cargo offerings, there may be delay in making up a full tow, consequently retarding the outbound trip.

But the ordinary maximum period that any towboat remains in the port of New Orleans is 12 to 48 hours, depending upon whether or not it is in need of emergency repairs. Every possible effort is made to keep the company's watercraft on the move for the greatest number of days a year inasmuch as it earns nothing when tied up. No equipment is ever laid up at any port except for temporary repairs or while awaiting outbound cargo, if not moved to another port where it is known to be more needed. At New Orleans, unless early need of an empty barge is anticipated, the same is moved to another point in order to avoid [fol. 239] accruing wharfage; and empties are moved, at times,

all the way from New Orleans to Cincinnati, or in reverse direction, depending upon how the bulk of water traffic is moving at the particular season of the year. Whenever there is no need of a particular boat or barge, necessitating its being laid-up,—the vessel in question is usually tied up in Mississippi Valley's fleet at Cincinnati.

It may here be observed that, according to the evidence, the usual round-trip voyage between Cincinnati and New Orleans consumes thirty-five days.

Mississippi Valley operates a general repair shop at Cincinnati, where its boats and barges are ordinarily repaired and overhauled, except that, as a matter of course, running or emergency repairs are made wherever they are found necessary; and because Cincinnati has no drydock facilities whatever, as have Pittsburgh, St. Louis and New Orleans, whenever there is need of putting a vessel in drydock to make repairs, the same is done where the facilities therefor are more readily available, but mainly at New Orleans, or Pittsburgh.

At New Orleans, Mississippi Valley employs a maintenance man who looks after the making of all necessary temporary repairs. Those are only such as must be made to enable the affected equipment to move out of the port. If repairs are needed but the trip to Cincinnati may, nevertheless, be safely undertaken, repairing is delayed until that port is reached.

At Cincinnati, St. Louis, Cairo, Memphis, and New Orleans, Mississippi Valley maintains its own terminals where it discharges and takes on cargo. At other points, such as Baton Rouge, Vicksburg, Louisville, Evansville, and Pittsburg, it [fol. 240] makes use of public terminal facilities.

New Orleans, inasmuch as it is a port through which is shipped freight in foreign trade—of which there was considerable in 1943 and 1944 because of war conditions—receives the greatest volume of Mississippi Valley's tonnage. A portion of the same is destined for New Orleans consignees, a part is loaded on oceangoing vessels, and some of its loaded barges are transferred to other motive power in uninterrupted towing operations westward by connecting lines, through the Intra-coastal Canal, to points of destination in Louisiana or Texas.

Nevertheless, Mississippi Valley's 'taxed' marine equipment rested in the port of New Orleans no more—of the total time possible—than as follows, viz:—In 1943, the four towboats, an aggregate of approximately 17.25%, and the barges, an aggregate of approximately 12.7%. In 1944, by contrast, the towboats, approximately 10.2%, and the barges, approximately 17.5%.

Mississippi Valley's terminal facilities at New Orleans have been located, for the past 15 years, on the Industrial Canal at the Galvez Street wharf, where it occupies dock space, four hundred feet in width, allocated to it by the Dock Board, on a

preferential basis, but this does not mean that its occupancy is exclusive since the Board may assign, in emergencies, part of such space to others as has been done on occasions when occupied areas were available for such assignment. The company maintains its dock office there, in its own structure, and the necessary tractors, trailers, derricks and cranes for loading and unloading of cargo; and maintains, also, a 'business solicitation' office in downtown New Orleans; seven or eight persons being employed at the dock office, and four at the other.

[fol. 241] In St. Louis, Mississippi Valley conducts its home, or main office which is staffed by fifty persons. Both there and at New Orleans, the company has other employees—dock laborers, hired by the hour to load and unload cargo, although a few are employed by the month at fixed salaries. The stevedoring operations at St. Louis, Cincinnati and New Orleans are substantially similar in size and character, although more dock laborers are employed at New Orleans.

(4) Union owns nine towboats and one hundred and twenty-two barges, which it employs in its interstate commerce operations as a water carrier, duly authorized by the Interstate Commerce Commission to ply certain portions of the Mississippi River system, including the Allegheny, Monongahela, Kanawha and Ohio Rivers, and the Mississippi from St. Louis to the Gulf of Mexico, as well as the Intracoastal Canal, west of New Orleans to Houston and Corpus Christi, Texas. In 1944, in addition to the

advantage which normally enures to it by reason of a standing agreement existent between it and other water carriers, for mutual interchange of towing, Union found it necessary to make use of two chartered towboats and many barges as such common carrier of water-borne freight.

No one or more towboats or barges are dedicated to use on any particular section of the inland water system traveled. The flow of traffic normally controls and directs assignment of towboat or barge to service. When a shipper, for example, requires a barge, a suitable one, depending upon the kind of cargo offered, is supplied and, after the loading cargo has been towed to and delivered to the shipper's point of destination, the barge may be re-loaded there and either wends its way back or proceeds further on, in continued movement of cargo, or it may be towed as an empty to any other [fol. 242] port where there is need for it for loading other freight offerings.

It its traffic from Pennsylvania to Louisiana, the principal commodities towed are manufactured steel products, etc., while the outbound freight from Louisiana is, in the main, petroleum products.

All of Union's downstream tows into Louisiana break up at New Orleans, but such barges as carry cargo intended for Texas ports are at once shifted to the motive power of towboats operated by barge lines that ply the Intracoastal Canal.

The bulk of Union's downstream freight originates in the Pittsburgh district, but it picks up cargo as it delivers, at intervening points, and the tow that finally comes to a halt at New Orleans may contain no barge that was once comprised in an original tow made up at Pittsburgh, but only such as were picked up in the tow's progress downstream, by way of replacing those consigned to intervening river points.

The ratio of Union's northbound traffic out of Louisiana to its southbound, is as of 3 to 1, the greater part of the outbound cargoes originating not out of New Orleans, but out of Baton Rouge. The time consumed in making a turn around trip from Pittsburgh to New Orleans is from thirty-five to forty days. A towboat, of necessity, usually stays longer in Pittsburgh than any barge, between trips, for the reason that running repair and maintenance work is done in that port and due consideration must be given to the time-off-requirements of the crew.

Union operates neither terminal nor office at New Orleans, but has a working arrangement with other barge [fol. 243] lines operating in and out of the port by which it assures the movement of its barges, and their tying-up whenever found necessary. It maintains no employees within the State of Louisiana, except that it does avail itself, for a money consideration, of the services of a shipping agent and importer, on occasion, in the manner and to the extent by it specially directed.

Arriving at Union's southern terminus, an inbound shipment of cargo is delivered in carrying barge to such New Orleans wharf as has been specified by the shipper, where barge and cargo are left at the responsibility of the consignee to be by him unloaded at his or the shipper's expense. When discharge of cargo is effected, the consignee notifies Union, which then seeks to effect prompt removal from the dock.

No towboats or barges are permitted to ever remain in port any longer than is necessary, Union's constant endeavor being to maintain the equipment at the maximum cargo ton mile performance, since it is uneconomical to have its barges lying idle, be it in Louisiana port or any other.

No loaded barge transferred to Union's motive power at New Orleans for northward towing, by any barge line operating out of Texas through the Intracoastal Canal, stays in port any longer than necessary to effect transfer, and, so soon as it is incorporated in a Union tow, it moves up the Mississippi.

All repairs are usually done at Pittsburgh. In New Orleans, Union maintains neither yard nor other repair facilities and equipment. Whenever emergency repairs are needed on either towboat or barges, the same is effected at the nearest available plant.

[fols. 244-251] Of Union's nine towboats, two did not enter Louisiana in 1944, and three of

the seven that did, i. e., the Sam Craig, C. W. Talbot, and J. D. Ayres, each came in but twice for aggregate stays in the port of New Orleans of 70½, 62 and 57½ hours, respectively, and in other Louisiana ports, of 73, 11 and 7½ hours, respectively, in the order named. A fourth, i. e., the Neville, entered three times, for aggregate stays in New Orleans of 99½ hours and in other Louisiana ports of 66 hours. The remaining three, i. e., the Peaco, William Penn, and Jason, each came into the State seven times for aggregate stays in the port of New Orleans of 203, 195, and 137 hours, respectively, and in other Louisiana ports, of 52, 242½ and 517½ hours, respectively, in the order named.

Thirty-eight of the cargo-carrying barges and one fuel flat owned and operated by Union, did not find their way into Louisiana during 1944.

Of the total 8784 hours of 1944, 97.8% were spent by Union's towboats outside of Louisiana ports, 95.7% were similarly spent by its cargo barges, and 98½ by its fuel flats, which last are used for carrying along the towboats required fuel on a long-distance trip, if, as a matter of fact a particular vessel is not provided with sufficient storage space aboard.

Union's home office is at Pittsburgh, and all of its officers are residents of Pennsylvania, within what is referred to as the Pittsburgh district.

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[fol. 252] As has already been observed, neither DeBardeleben, American, Mississippi Valley, nor Union, is a Louisiana corporation, Delaware being the State that gave the first three 'the power to be as well as the power to function,' while Pennsylvania stands in like relation to Union.

No part of the taxed watercraft and marine equipment of the three was within Delaware, corporate domicile of each, at any time; but Union's like movable property was located in Pennsylvania, from and to which state it was continuously operated in interstate commerce during the years 1944 and 1945.

In none of the cases under consideration can either the State of Louisiana or the City of New Orleans successfully maintain the claimed right to tax any of the movable property in question unless it be established by the evidence that such property has acquired an actual situs for taxation within the State's jurisdictional limits notwithstanding a previously existent situs originally established by law at the domicile of the property-owner."

Judgment of Court of Appeals

That the Court of Appeals did not consider the constitutionality of the statute under review, but was concerned only with its interpretation and application, is shown by the conception of the issue by the Circuit Court

of Appeals. (*Ott v. DeBardeleben Coal Corporation*, 166 Fed. (2d) 509). The Court said: (R. 108)

"The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there".

The Court further said: (R. 110)

"The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans. With respect to DeBardeleben, it found that New Orleans was the home port of its tugboats and barges, from which they operated; that with the exception of the eight barges in Alabama, its watercraft were never permanently away from that city; hence the tax situs was in Louisiana and the tugboats and barges having a tax situs there could be taxed by the City of New Orleans".

Continuing, the Court said that the District Court had held the assessment against the property of Debardeleben Coal Corporation having a situs in New Orleans was invalid, because the assessment as a whole, and which was never separable nor divisible; included barges which were permanently situated in Alabama.

The Court summed up its appreciation of the issue and its action as follows: (R. 110)

"The correctness of these rulings with respect to the several companies is the sole question before us".

Since the question of situs and the power of taxation, dependent upon situs, was the sole issue before the court, it conclusively results that the question of the constitutionality of the statute on the ground that it worked an impediment on interstate commerce and was unconstitutional because of the mode of assessment, the court did not decide. The lower court and the Court of Appeals found it sufficient to determine and decide that the taxes were exacted on property which was beyond the taxing power of Louisiana, because the property had not acquired a locus for taxation in Louisiana. The very statement of the issue and the nature of the decision of the Court of Appeals clearly emphasizes the contention that this appeal does not lie, because only a question of fact, involving the situs of property, was decided by the court and the constitutionality of the act under which the taxes were imposed was never ~~trenched~~ upon.

**Appellants' Statement of Points to be
Relied Upon (R. 133)**

1. That Act 59 of 1944 of the Legislature of Louisiana actually fixes the situs in Louisiana of the portion taxed of the watercraft of the three appellee barge lines herein.

2. That there is no prerequisite in said Statute that a taxing situs for this equipment must first be found in Louisiana to enable that State to tax.

3. That all that is required under Louisiana law, to allow Louisiana the right to tax, is the showing that these appellee interstate water carriers operate in Louisiana continually throughout the year; and that such a showing has been indisputably made in these cases.

4. That such taxes have been assessed and collected on a proportionate mileage basis in accordance with Louisiana law.

5. That the Circuit Court of Appeals erred in holding that a taxing situs need be shown to allow New Orleans and Louisiana to collect its share of the taxes on these towboats and barges when the Louisiana Statute (Act 59 of 1944) specifically provides that the proportionate tax is collectible upon a showing that respondent barge line companies run their lines into Louisiana, which is admitted, and no actual situs need be shown as such, to collect these taxes under the Louisiana Statute.

6. That the Circuit Court of Appeals therefore erred in applying the law of situs in these cases.

7. That the Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

8. That the Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.

9. That the Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in

effect, holding that these provisions of the Louisiana Statute violate the due-process-of-law clause of the 14th Amendment of the Constitution of the United States.

[fol. 416]. 10. That the Circuit Court of Appeals erred in holding for respondent barge lines in these cases, decreeing these taxes illegal and invalid.

11. That Act 59 of 1944 of the Legislature of Louisiana is constitutional, is not repugnant to the provisions of the Constitution of the United States, and that Louisiana and its municipalities have the right to their share of ad valorem taxes on the watercraft of these appellee interstate carriers under Louisiana law, as collected in these cases.

1. *That Act 59 of 1944 of the Legislature of Louisiana actually fixes the situs in Louisiana of the portion taxed of the watercraft of the three appellee barge lines herein.*

The statement that the Louisiana Legislature may, by mere declaration, create situs for physical property is not consonant with principles of taxation long recognized and honored in their application. The question of situs is one of fact. It is dependent upon the intent of the owner that property shall remain in a given state and thereby receive all of the benefits that the sovereignty may confer upon the owner and the property. It is, of course, true that the intent of the owner is not purely subjective, but the test is objective, dependent upon the time which the property remains in the state, and it is sometimes determined by the purpose of its remaining. That the Legis-

lature of Louisiana could declare subject to its taxing power property located in the taxing jurisdiction of Pennsylvania, Ohio and Missouri, challenges every principle of protection afforded by the Constitution of the United States under the due process clause. Argumentatively, it is asserted that there is a sceptered power in the Louisiana Legislature to banish into the limbo of dead laws, the protection afforded by the due process clause and the proscription of state power over interstate commerce. To labor the argument in refutation of the contention is to exhaust fundamentals which are easily discernible and applied with equal facility. If the Legislature of Louisiana has power, by mere fiat, to declare the locus of the property for taxation, the power being sovereign in its nature, would have no restriction and so by declaring that property situated in Texas had a locus for taxation in Louisiana, the latter state could tax property beyond its territorial limits as a matter of mere desire.

2. That there is no prerequisite in said Statute that a taxing situs for this equipment must first be found in Louisiana to enable that State to tax.

This statement of a point to be relied upon is no more than a restatement of the tax fallacy first propounded. If the State of Louisiana has no power to tax tangibles having a locus in another state, it must follow inevitably that where the Constitution of the United States is invoked, its operation cannot be precluded by the assumption by Louisiana of a power not inhering in its sovereignty. The effect of the Louisiana legislation cannot be given absolute and uncontrolled operation. Where its asserted power collides with the constitutional guar-

antee of the Fourteenth Amendment, it can make no difference whether it prescribes or omits the constitutional requisite for the tax. Theoretically, the Louisiana statute is constitutional and its application not to be denied where it may be properly applied. There can be no question that Louisiana as a sovereignty may choose any method of assessment which is not arbitrary, unreasonable or capricious, and does not transcend its power as State so as to conflict with Federal power and protection. The statute under review may be precisely expressive of the taxing power of the State. The General Assembly might have decided that in the encouragement of commerce, it would not tax to the limit watercraft which has a situs in Louisiana, but which is not in Louisiana during the whole year. It might be a matter of State policy, in the encouragement of vessel owners to locate in the State, to provide that the assessment of these vessels shall be on the basis of time traveled in Louisiana in comparison to the entire mileage traveled by the vessels during the taxing year. When so applied, the statute becomes rational, and the power expressed is constitutional.

The District Court and the Court of Appeals in this case recognized the validity of such a statute and the rationale which dictated its enactment. It held that the property of DeBardeleben Coal Corporation had an actual situs in New Orleans, and, consequently, that its property was subject to the terms of the statute and to be assessed upon the proportionate basis. The decision in the DeBardeleben Coal Corporation case recognized the sense of the statute, and its rational application to a subject of taxation, differing in time and use from real estate, which

remains stationary throughout the year. The movement of the watercraft in and out of Louisiana is suggestive of the purpose of the statute and the policy of encouragement to vessel owners to locate in Louisiana.

3. *That all that is required under Louisiana law, to allow Louisiana the right to tax, is the showing that these appellee interstate water carriers operate in Louisiana continually throughout the year; and that such a showing has been indisputably made in these cases.*

The implication of that point is that the tax is put upon the engagement in business and is not an ad valorem tax on the property which is subject to the assessment. It is undeniable that if these appellees carry on throughout the year a business of transportation, that the State of Louisiana might put an income tax upon the net profits of the operations. However, to so concede is not to admit that simply because the business is carried on throughout the year that some part of the equipment not having a situs in fact within the State of Louisiana, may be subjected to an ad valorem tax... It is conceivable that throughout the year, towboats and barges come into Louisiana in connection with its business of transportation. That fact alone, however, would not permit the State of Louisiana to tax a lifting crane or a fuel flat, or some other type of watercraft which comes into the State for but a single day. The fact that these particular kinds of property might be owned by a transportation company and used in connection with the business of the company would not subject it to the taxing power of Louisiana. The argument is suggestive of the contention that any property belonging to a

transportation company operating regularly within the State of Louisiana is subject to an ad valorem tax, regardless of the fact that its stay is casual and impermanent. The power of Louisiana to tax tangibles is dependent upon the dominion of the State over such tangibles, and finds no foundation in the mere fact that the owner of the property sends other equipment regularly into the State. The power to tax one entity does not generate the right to tax another. If it were the business which is sought to be taxed, as distinct from the instrumentalities employed in the business, the statement of the point, while debatable, would not be wholly baseless. There can be no question that some of the towboats and some of the barges of the appellees come into the State of Louisiana in connection with their business, but, equally, it must remain beyond dispute that all of the equipment against which the taxes are assessed has not come into Louisiana, and none of it has acquired a permanent situs for taxation within the State.

4. *That such taxes have been assessed and collected on a proportionate mileage basis in accordance with Louisiana law.*

The argument of the appellants seems to rest upon the conception that there is magic in the proportionate theory of taxation, and that by the black art, property which does not have a taxing situs in Louisiana, is transfigured into such taxable property by the mere statement that the tax is based upon the proportion of mileage traveled within the State and without the State. Before the State can apply the proportionate theory to the taxation of these tangibles, it must first show that they are subject to taxation by the State of Louisiana and that the

proportionate method is a practical and just method of taxation. To baptize the statute as one of apportionment is not to create the power of taxation. The characterization of the statute is no valid substitute for the need of showing the dominion of the state over the property so as to make it subject to the taxing authority of the State. The mere statement that "the taxes are assessed in accordance with Louisiana law", merely states the issue, but does not decide it. If the power of Louisiana were paramount to the authority of the Federal Government, and there be no need to subject the matter to the test of the Federal Constitution, the statement of the point might be material. However, the very question which the court must decide is whether or not the State has power over the tangibles of the appellees and if it so finds there is foreshadowed the next question of whether or not as to vessels, the theory of apportionment is an equitable distribution of the burdens of taxation, or whether, when applied to vessels, the system applicable to railroads is arbitrary and capricious. The statement that Louisiana has legislated that regardless of situs, the property is taxable by Louisiana finds no sanction in legal thinking.

5. That the Circuit Court of Appeals erred in holding that a taxing situs need be shown when Act 59 of 1944 specifically provides that the proportionate tax is collectible upon a showing that appellees run their lines into Louisiana, and no actual situs need be shown to collect these taxes.

This point of reliance evidences a complete confusion between a business tax and an ad valorem tax. The

theory of this contention is that if one be engaged in business and comes into Louisiana with any part of its property in connection with that business, the mere arrival of the equipment becomes the basis of the tax. The statement that situs for the imposition of ad valorem taxes need not be shown foretells taxing chaos, which the order of law is intended to prevent. If recognition were given to that statement as a principle of law, it would mean that every port into which a vessel might go and leave immediately, would have the power of taxation. No such theory has ever received recognition by any court, and if the chaos which the practice would create could be changed into a law, business would be at the mercy of the greed for taxes of every state into which a vessel might go. Nothing in the law has ever foreshadowed such a result, and the teachings of taxation deny even the suggested possibility of such a principle.

6. *That the Circuit Court of Appeals therefore erred in applying the law of situs in these cases.*

The argument of the appellants proceeds upon the theory that if a state statute imposes an ad valorem tax upon tangibles, that the court must make itself bereft of constitutional principles and must be blinded to the existence of the protection of the Fourteenth Amendment. The soul of the argument is that the court must apply the statute, regardless of the power of the state to tax and is inhibited from inquiring into whether or not the power of taxation is existent. The end of the argument is that the constitutional principles must be discarded in the adherence to the enforcement of the statute, regardless of the power of the state to enact it. If that should be, con-

stitutional principles of protection would dissolve from view, and whenever it be urged before a court that property is being taken without due process of law, because the state is without power to tax, the destructive rejoinder would be made that the state says that by enacting the legislation, it has power to tax, and no constitutional inquiry might be made as to whether or not the property is within the dominion of the state.

To reduce the argument to its natural absurdity, if Louisiana imposes an ad valorem tax on ships situated in New York, the court would be without power to declare the tax unconstitutional because the state desired it otherwise. Courts would be precluded from ascertaining whether or not the property had a locus in the state, so as to subject it to taxation, and the only course open to a court would be to enforce the statute according to its terms, regardless of its unconstitutionality.

7. That the Circuit Court of Appeals erred in not applying the clear and unequivocal provisions of the Louisiana Statute (Act 59 of 1944) in these cases, which provisions hold that the Parish or Municipality in Louisiana in which these interstate barge lines operate shall be the taxable situs in Louisiana of this property.

This point is merely a restatement of other points, framed in different language, but having the same lack of legal principles. The force of the argument is that if the Legislature of Louisiana says that property is subject to taxation, because it has a locus in Louisiana, that the

declaration of the Legislature makes the asserted fact absolute. Advanced to its ultimate end, the argument is that the power of the Legislature of Louisiana is paramount to the protection and prohibition of the Federal Constitution. The mere assertion of the existence of the statute would denude the court of its judicial function of inquiring as to whether the statute violates constitutional provisions.

8. *That the Circuit Court of Appeals erred in not applying the proportionate rule of taxation as to mileage in these cases as called for in the Louisiana Statute.*

This is, again, a statement of the heretical principle of taxation upon which the appellants rely. The substance of the argument is that if the State of Louisiana applies the proportionate rule of taxation, that regardless of its power to tax, the statute is valid. The foundation of the contention is that if the State of Louisiana employs a method of taxation which would be valid within the field of authority, that the application of the form of taxation is the genesis of the power of taxation. The confusion between the method and the power is the fallacy upon which the whole argument of the appellants is founded.

9. *That the Circuit Court of Appeals erred in nullifying the clear provisions of the Louisiana Statute and in effect holding that these provisions of the Louisiana Statute violate the due-process-of law clause of the 14th Amendment of the Constitution of the United States.*

10. That the ~~the~~ Circuit Court of Appeals erred in holding for Respondent barge lines in these cases decreeing these taxes illegal and invalid.

11. That Act 59 of 1944 of the Legislature of Louisiana is constitutional, is not repugnant to the provisions of the Constitution of the United States, and that Louisiana and its municipalities have the right to their share of ad valorem taxes on the watercraft of these appellee interstate carriers under Louisiana law, as collected in these cases.

The three latter points are but repetitions of the same points, stated in a different fashion. The pattern of the argument is substantially the same and the destructive answers to the other points are equally applicable to the last three points. It serves no useful purpose to again answer these points *seriatim*, because it would have the same futility of setting up ten pins solely for the purpose of knocking them down.

Situs is the Foundation for Tax Exaction

It would appear that *Northwest Airline, Inc., v. Minnesota*, 322 U. S. 292, has definitely and permanently settled one of the issues here. While there were dissenting opinions in that case, the dissents were largely concerned with the fact that the decision did not excise the power of other states to tax the airplanes which had been taxed in Minnesota. The cited case proceeded upon the theory that Minnesota gave origin to the Northwest Airlines and that since it derived its powers from that state, and its air-

planes acquired no permanent situs otherwise, that Minnesota, being the state of origin, had the right to tax all of the airplanes, notwithstanding they were not in Minnesota throughout the year and might have been in states other than Minnesota during parts of the year. By analogy, the property of these appellees is taxable in Delaware and Pennsylvania, the states of their creation. This is not to say, however, that if the property of these appellees had, by the process of time, acquired a locus in Louisiana for purposes of taxation, that Louisiana as a sovereignty could have been denuded of its right to exact taxes because other states, for other reasons, had been able to collect taxes on the property, the subject of the present issue. The case is of too recent origin and its discussions so fresh in memory, that it will serve no point to review the facts, but it should suffice merely to state the principles.

During the course of the opinion, the court reviewed *New York Central and H. R. R. Co. v. Miller*, 202 U. S. 584 and said: (295)

"It was not shown in the *Miller* case and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i. e., a taxing situs, elsewhere. That was the decisive feature of the *Miller* case, and it was deemed decisive as late as 1933 in *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, which was strongly presided upon us by Northwest. In that case it was not the home State, Illinois, but a foreign State, Oklahoma which was seeking to tax a whole fleet of tank cars used by the oil company. That case fell outside of the de-

cision of the *Miller* case and ours falls precisely within it. 'Appellant had its domicile in Illinois', as Mr. Chief Justice Hughes pointed out, 'and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere'. 290 U. S. 161."

The argument that merely because any part of the watercraft of the appellees comes within the State of Louisiana that it may be taxed regardless of whether it has, within the legal concept, acquired a locus for taxation, is readily disposed of by the following pronouncement of the court. (297)

"The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier 'engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run'. *Union Transit Co. v. Kentucky*, *supra*, at 206. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce

visiting for fractional periods of the taxing year. (Thus, for instance, 'The coaches of the company . . . are daily, passing from one end of the State to the other,' in *Pullman's Car Co. v. Pennsylvania*, supra at 20, citing the opinion of the court below in 107 Pa. 156, 160). The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

"The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is."

The court further said:

"Minnesota is here taxing a corporation for all of its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted.

See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personality which is permanently attributable to Minnesota and to no other State".

The court further said:

"Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks".

In opposition to these principles, the contention was made that since the planes were not continuously in the State of Minnesota, but were in other states for varying periods, in some cases sufficiently long to bring to birth

the concept of situs, that these other states could tax these planes, and the result would be double taxation. It was urged that because of the possibility of other states taxing the planes, because of their permanency in those states, that the State of Minnesota was bereft of taxing power to the extent of the power of other states to tax. The court pointed out that there was no constitutional prohibition against double taxation, and refused to foreclose the question of the taxing power of states other than Minnesota if Minnesota taxed the entire fleet.

Assimilating the cited case to the facts of this case, we find that the court has again recognized the imperishable principle that a state may tax only that property which acquires a situs within the state, and that the state of the domicile may tax property, notwithstanding it does not have a locus in the state of its creation, and may even have a locus in some other state. It also differentiates the apportionment theory between land commerce and commerce by air or water. It limits the apportionment theory to instrumentalities of land commerce, but repudiates the theory insofar as it applies to airplanes. The repudiation in principle must inevitably extend to water craft, and recognize the principle that where such watercraft has not acquired a permanent situs outside of its domiciliary state, that state alone has the power of taxation.

Delaware and Pennsylvania in these cases are the parallels of Minnesota in the Northwest Airlines case. By analogy, Delaware and Pennsylvania might tax this water equipment of appellees because of the benefits conferred upon the corporations by these respective states. How-

ever, Louisiana is without a like power, since it is neither the state of situs, nor the state of creation. Admittedly, under the decision of the *Northwest* case, there is a power in Delaware and Pennsylvania to tax which does not exclude the power of other states to tax if such states have acquired dominion over the property, because of the permanency of the property within such states. In this case, the property moves too rapidly to connote permanency and so, consequently, Louisiana is without authority to tax.

In his concurring opinion, Mr. Justice Jackson points out the nature of airplanes which go from place to place. He points out their regulation by Congress and thereby analogizes the movement of watercraft under similar control by Congress, which necessitates the issuance of a Certificate of Necessity and Convenience by the Interstate Commerce Commission. The contention of the appellants in this case finds clear repudiation in the statement of principles long accepted as controlling when it is said: (305).

"Does the act of landing within a state, even regularly and on schedule, confer jurisdiction to tax? Undoubtedly a plane, like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax.

Hays v. Pacific Mail S.S. Co., 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; cf. *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409."

"It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help. The best analogy that I find in existing decisions is the 'home port' theory applied to ships. See *Hays v. Pacific Mail SS Co.*, *St. Louis v. Ferry Co.*, *Morgan v. Parham*, supra. There is difficulty in the application of this doctrine to air commerce, I grant. There is no statutory machinery for fixing the home port. If federal registration established statehood as it establishes nationality the home port doctrine would be easy to apply."

Even in the late case of *Curry v. McCanless*, 307 U. S. 357, 363, 365, the court recognized and enunciated the principles for which appellees contend. It held that while many aspects of ownership of intangibles may be taxed by different sovereignties, that, nevertheless, tangible personal property is subject to taxation by a single sovereign.

The court said:

"That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for the purposes of the jurisdiction of a Court to make disposi-

tion of putative rights, in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since.

"Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see *Salmond Jurisprudence, Second Edition* (398), its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. *Green v. Van Buskirk*, 7 Wall. 139, 150; *Pennoyer v. Neff*, 95 U. S. 714; *Ardt v. Griggs*, 134 U. S. 316, 320-321. See *McDonald v. Mabree*, 243 U. S. 90, 91; Cf. *Harris v. Balk*, 198 U. S. 215, 222; *Frick v. Pennsylvania*, *supra*, 497. The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his owner-

ship and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles, if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax. See *Union Transit Co. v. Kentucky*, 199 U. S. 194, 202; *Frick v. Pennsylvania*, 268 U. S. 473, 489, *et seq.*"

Johnson Oil Company v. Oklahoma, 290 U. S. 158, has facts as near precisely alike as two cases might have when the facts are considered in the light of the law and not absolute conceptions when viewed as an abstraction. In that case, the Johnson Oil Company owned tank cars, which traveled from Illinois, where it had its principal office, to Oklahoma. In Oklahoma, they were unloaded as quickly as possible and returned to Illinois. The court said that in order to determine the controlling Federal principles, it was necessary to review the facts of *Beidler v. South Carolina Tax Commissioners*, 282 U. S. 1, 8. The court said that these cars operated to transport refined products from Oklahoma to various points of delivery throughout the United States.

"They are almost exclusively engaged in interstate commerce. They are very infrequently used in connection with an oil plant appellant owns in Illinois.

They are sometimes loaded at refineries located in States other than Oklahoma."

The court further said:

"The cars are almost continuously in movement. Returning to Cleveland to be reloaded, the cars remain on the tracks from twenty-four hours to ten days, depending on the season of the year and the volume of products handled. They are on the tracks for reloading purposes twenty-four hours. Each of the cars makes about one and one-half trips every thirty days, that is, each car is loaded at the Cleveland Refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty days."

In the case at bar, the barges are loaded at various points on navigable rivers and are sent to points of destination. There, they remain no longer than they can be loaded and propulsive power secured for returning them upstream. It is to the interest of the owners that the equipment does not lie idle, because each towboat and each barge represents a capital investment, and its value is proportioned to its earning, and, in turn, the earnings are dependent upon the use of the equipment. The greater the use, the greater the income from the use. If a barge remains in Louisiana for any time, it is not at the mere will of the owner with a wish for its remaining, but is there awaiting cargo, or motive power, or for repairs or other matters intimately connected with the transportation service of the owners.

The court in treating these tank cars, said:

"Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a nondiscriminatory property tax in a State which can be deemed to have jurisdiction. *Marge v. Baltimore & Ohio R. Co.*, 127 U. S. 117, 123; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 23; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 82; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 282. Appellant had its domicile in Illinois and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.' See *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 597; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 69. But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 209, 211; *Western Union v. Kansas*, 216 U. S. 1, 38; *Frick v. Pennsylvania*, 268 U. S. 473, 489. While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this

description must be determined on a basis which is consistent with the like jurisdiction of other States.

"The basis of the jurisdiction is the habitual employment of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. *Marye v. Baltimore & Ohio R. Co.*, supra. This principle has had frequent illustration. It was thus stated in *American Refrigerator Transit Co. v. Hall*, supra (p. 82): It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected; in cases like the present, where the specific and individual items of property so used and employed

were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and employed.' See also, *Union Refrigerator Transit Co. v. Lynch*, supra; *Union Refrigerator Transit Co. v. Kentucky*, supra; *Germania Refining Co. v. Auditor General*, 184 Mich., 618; 151 N. W. 605; affirmed 245 U.S. 632; *Union Tank Line Co. v. Wright*, supra.

"Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State."

If Oklahoma could not tax all of the cars of the Johnson Oil Company, which were continuously in motion, neither can Louisiana tax the towboats and barges of the appellees continuously in motion. The fact that only a percentage of the total value is assessed, creates no legal difference, because if it had no power, like Oklahoma, to assess all of the towboats and barges, it can not make the assessment, and the unconstitutionality of the assessment

is not saved by basing the tax upon a percentage of the assessment instead of the totality.

While no case is the exact replica of another case, yet governing principles are the same where the facts are analogous. It is hardly to be supposed that any case, more nearly alike in facts to the present case, can be found than *Johnson Oil Company v. Oklahoma*, supra. If Oklahoma was without power, under the given facts of that case, to tax the tank cars of the Johnson Oil Company, more cogently it is apparent that the State of Louisiana is without the right to tax the property of the appellees. The claimed right of Louisiana is based upon several tenuous grounds. It is claimed that because the towboats and barges of the appellees come into Louisiana, that the Legislature of Louisiana has the right to say that these towboats and barges could be taxed proportionately on the basis of miles traveled within Louisiana and miles traveled without Louisiana. It is argued that Louisiana does not tax the entire value of the watercraft, but only a proportionate value, and because of the principle of apportionment, the tax is sustainable. The argument, of course, overlooks the fact that if Louisiana has the power to tax this equipment, the authority must rest upon more than an act of grace in not taxing the property to its full value, but being satisfied with a percentage of value. It must be clear that the power to tax is plenary and that if Louisiana has the power to tax, it has the right to tax to the full value of the property. If Louisiana has the right to tax merely because the property comes into Louisiana for indefinite and undetermined periods, then every state into which the property goes has a like power of taxation. While Louisi-

ana might be more gracious in not exercising its power to the full, yet, other states might be less gracious and tax the property to its full value. The result would be that every state into which the property goes could exert the plenitude of the power of taxation, and, since the power to tax does not spring from the use of the doctrine of apportionment, every state could treat tangible personal property as if it had an actual situs in that state merely because the property came into the state at irregular intervals and remained for short periods.

Ships Can be Taxed at Their Home Ports or Otherwise Only Where They Have Acquired a Situs

The question at issue of the power of taxation under like facts has been decided in the early dawn of the jurisprudence of this country. The decision has remained unquestioned throughout the juridical history of the country. The case of *Hays v. Pacific Mail Steamship Company*, 17 Howard 597, 713, was decided in 1854. The Pacific Mail Steamship Company was a New York corporation with headquarters in New York and agencies in San Francisco and various other ports. It operated steamships between the port of New York and the City of San Francisco and stopped at intermediate ports. The company owned a naval dock at Benecia, California, for finishing and repairing its ships. The ships were registered at New York. This apparently was not important in the decision of the case.

The *ratio decidendi* was as follows:

"These ships are engaged in the transportation of passengers, merchandise, etc., between the City of

New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized, or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states:

"Now, it is quite apparent, that if the State of California possessed the authority to impose the tax in question, any other state in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State. . . .

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with this *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

St. Louis v. The Ferry Company, 11 Wall. 423, is clearly decisive here.

The court said:

"The court found that the boats, when not in actual use, were laid up by the Illinois shore, and were forbidden, by a general ordinance of the City of St. Louis regulating ferries and ferryboats, to remain at the St. Louis wharf or landing longer than ten minutes at a time.' A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. * * *"

The court then said:

"They did not so abide within the city as to become incorporated with and form a part of its personal

property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained."

Morgan v. Parham, 16 Wall. 471, is expressive of the crystallized jurisprudence. The Steamer "Frances" was owned by Morgan, domiciled in New York. "The Frances" was brought to Mobile in 1865, and from that time until the trial in 1870, had been employed as a coasting steamer between Mobile and New Orleans." The vessel was registered in New York and:

"In January, 1867, the vessel was regularly enrolled at the custom-house in Mobile by her master, as a coaster, and her license as a coasting vessel was renewed in the several years 1868 and 1869, and with other similar vessels constituted one of a daily line of steamers plying between Mobile and New Orleans."

The court denied, upon these facts, the right of Alabama to tax the vessel, and said:

"It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the states with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value."

The court further said: (478-479)

"The vessel touches tri-weekly or daily at Mobile, and the same at New Orleans. If her regular route were from New Orleans to Mobile, thence to St. Augustine, thence to Savannah, thence to Charleston, and returning by the same course, the case would be no different. She would be engaged in interstate commerce, with her home port still remaining unchanged, and the property continuing unmixed with the permanent property of either State. Her right to trade at each of those ports, without molestation by either of these States, is secured by the Constitution of the United States. The Federal authority has been exerted by the passage of the navigation laws and the issuing of a coasting license to this vessel. All State interference is thereby excluded."

"Whether the steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case I have supposed."

"The jurisdiction of this court over the present case, as in the case of *Hays v. The Pacific Mail Steamship Company*, arises from the facts, first that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and secondly, that the vessel

was lawfully engaged in the interstate trade, over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city. Within the authorities it is an interference with the commerce of the country not permitted to the States."

Moran v. New Orleans, 112 U. S. 69, affirms the principle of *Hays v. Pacific Mail Steamship Company*. There, the City of New Orleans sought to collect a tax from persons owning and operating towboats to and from the Gulf of Mexico and the City of New Orleans. This was clearly held to be a regulation of commerce among the states and violative of Article 1, Section VIII, of the Constitution of the United States. The rationale of the decision is the freedom of navigation imbedded in the Constitution of the United States from taxation by states. The principle upon which the decision rested was the fact that the State of Louisiana could not exact a tax for the privilege of navigating the Mississippi River. The tax here if sustained would be a tax upon the privilege of coming to and going from New Orleans to other ports on the Mississippi River for the purpose of loading and unloading.

In *Pullman Car Company v. Pennsylvania*, 141 U. S. 18, the Court clearly differentiates the power to tax railroad cars on a mileage basis and the right of the State to tax water equipment used in interstate commerce and

remaining within a State temporarily for the purpose of the commerce. There can be no doubt that such water equipment, although used in interstate commerce is not free because of the use to which it is dedicated from the taxing power of a State where it has its situs.

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 549; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 124; *Leloup v. Mobile*, 127 U. S. 640, 649.

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners.

Hays v. Pacific Mail Steamship Co., 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

"Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed and traversing the land only, the distinction is obvious. As has been said by this court: 'Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and es-

pecially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.' *Railroad Co. v. Maryland*, 21 Wall. 456, 470."

The Court quoted from *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, to the following effect:

"While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce."

Old Dominion Steamship Company v. Virginia, 198 U. S. 299, 308, approved the principle of *Morgan v. Parham* and differentiated it from the case at the bar. The court, in the *Old Dominion Steamship Company* case, rightly upheld the power of Virginia to tax vessels incorporated into the mass of property of that state. The Old Dominion Steamship Company owned vessels which were intended to and did operate exclusively within the State of Virginia, and, therefore, acquired a situs therein. It was urged that these vessels were taxable only at the domicile of the owner, but the court repelled this contention by holding that where

the owner had incorporated his property into the mass of property of another state, it became subject to taxation by that state.

Ayer & Lord Tie Company v. Commonwealth of Kentucky, 202 U. S. 409, is a solid foundation upon which to rest the contention of the appellees. Kentucky sought to tax the marine equipment of the complainants on the ground that its vessels bore on their sterns "Paducah" as the place of their enrollment. The court held that this alone did not make these vessels subject to the taxing powers of Kentucky if, as a fact, they had not acquired a situs in Kentucky.

The court said:

"The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicile of the owner it may there be taxed because within the jurisdiction of the taxing authority."

Southern Pacific Company v. Kentucky, 222 U. S. 63, 69, emphasized the principle when it said:

"The persistance with which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear

that the vessels had an actual situs elsewhere, is illustrated by the cases of *Hays & Pacific Mail Steamship Company*, 17 Howard, 596; *Morgan v. Parham*, 16 Wallace 471; *St. Louis v. Ferry Co.*, 11 Wall, 423; *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, and the case of *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409."

This case dug deep by reasoned processes the difference between the theoretical situs of property for the purpose of taxation and actual situs. It determined that since the steamships of the Southern Pacific Company plied between New York and Galveston, that they had not acquired a situs in New York, and that painting upon the stern of these ships "New York" as the home port did not necessarily create the fact of situs in New York.

It said (67) :

"The owner has no power to give his vessel a taxable situs by the arbitrary selection of a home port, which is neither his domicile nor the domicile of actual situs."

It properly held, therefore, that for the purpose of taxation personal property must have some situs. Its owner must bear the burden of supporting government in return for the protection which the property receives, and that the owner, by an arbitrary choice of registry or enrollment removed from the actual fact of location, cannot escape taxation. Upon a review of the facts, it found that these steamships had not acquired a taxable location in New York, and, consequently, were taxable at the domicile

of the owner. The court rejected the contention that mere visitation was a substitute for situs, and so held that these steamships were not taxable in New York and, as a consequence, were taxable in Kentucky. The water equipment of the plaintiffs is taxable in Delaware and Pennsylvania respectively.

A State Tax Which is an Impediment to Interstate Commerce is Unconstitutional

Joseph v. Carter & Weekes Company, 330 U. S. 422, involved the constitutionality of a tax on the gross receipts of a stevedoring company, engaged in loading exclusively in interstate commerce. While the case dealt with the constitutionality of the gross receipts tax, as being an impediment on interstate commerce, the principles applicable there are equally applicable here. It is, of course, undeniable that interstate commerce, or the property or net income from interstate commerce, must bear its just share of the tax burden. It is equally true that if the exercise of the power of state taxation has the result of so burdening interstate commerce as to result in an impediment to that commerce, the taxing power of the state must stop at the limits of the constitutional grant of the power of Congress over interstate commerce. The use of the waterways of the country in the service of interstate commerce has become increasingly recognized as a needed use. Any tax that has the effect of preventing the use of the waterways for such needed purpose is unconstitutional.

The power of a state to tax an instrumentality of interstate commerce, which has no locus for taxation within the state, is clearly abridged by the Commerce Clause.

The power of the state to tax is proscribed within the area of interstate commerce subject to the grant of power to the Federal Government. While there is a consistent attempt at accommodation of the prohibition of the Commerce Clause and the taxing power of the state to secure needed revenues, nevertheless, the courts have invariably held that where the tax impedes interstate commerce, or its imposition may lead to its destruction, that the state is without power of taxation resulting in impediment or destruction of interstate commerce:

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock v. Bureau*, 303 U. S. 250, 255."

There remains only the application of the principle to the facts. The appellants have asserted the power to tax the towboats and barges of the appellees, even though they do not have a taxing locus in Louisiana. The contention rests upon the unstable ground that if Louisiana applies the apportionment theory of taxation, that it escapes the bane of unconstitutionality. It is asserted by appellants:

"Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation."

The statement implements the contention that if the towboats and barges come into Louisiana at all, or re-

gardless of the length of stay, that such towboats and barges may be taxed on a proportion of the mileage traveled in the State of Louisiana as compared to the entire mileage traveled by these towboats and barges within the taxing year. The invalidity of the argument must appear from that fact that the provisions of the statute make it not only applicable to many towboats and barges of a regular line, operating continuously, but make it equally applicable to a single towboat. If the argument of the appellants be pursued to its logical end, and if the statute be held as constitutional, it would result that if a company owned a single towboat and a single barge, that every state through which the towboat and barge passed, as an instrument of interstate commerce, could tax it on the basis of the mileage traveled within that state, in proportion to the mileage traveled in every other state. Thus, for example, if the Union Barge Line Corporation owned but a single towboat and a single barge, and sent the towboat and barge from Pittsburgh to Houston, Texas, each state through which it passed, could tax it. If it made no stop in Ohio, Ohio could tax this equipment merely on the basis that it passed through Ohio. The State of Mississippi could tax it on the same basis, and every other state through which it passed on its uninterrupted journey from Pittsburgh to Houston, Texas, could tax it. The multifold taxes could be so great as to exceed the profits from the operation and thereby forbid the owner of the towboat and barge from engaging in interstate commerce. The cited case denies the constitutionality of such a result.

It is undeniable that the mere incidence of a tax on interstate commerce does not decree its destruction. There

must be a needed adjustment between the prohibitions of the Federal Constitution and the taxing power of the states. This accommodation is found by declaring the mere imposition of a tax upon interstate commerce, increasing the cost of that commerce, is not necessarily a ground of nullification, if the tax touches but incidentally or remotely the commerce. However, where the impact of the tax is such as to be an impediment upon that commerce and to interfere with its free flow between the states, then, the defect of unconstitutionality appears. The Federal Constitution prescribes the area in which the taxing power is forbidden to invade. There needs no declaration of Congress to define the limits of forbidden territory to the states.

"This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables". *Freeman v. Hewit*, 329 U. S. 249, 252. See also *Morgan v. Virginia*, 328 U. S. 373 and *Southern Pacific Co. v. Arizona*, 325 U. S. 761.

The court further said:

"The power to tax is a dominant power over commerce. . . Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce."

Western Live Stock v. Bureau, 303 U. S. 250, 255:

"... The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & Sou. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. R. Co. v. Texas*, *supra*; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298) or added to (*Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station v. State Tax Comm'n*, 297 U. S. 650) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See *Philadelphia*

& *Sou. S. S. Co. v. Pennsylvania*, supra, 346; *Case of State Freight Tax*, 15 Wall. 232, 280; Bradley, J., dissenting in *Maine v. Grand Trunk Ry. Co.*, 132 U. S. 217, 235; cf. *Pullman's Palace Car Co. v. Pennsylvania*, supra, 26. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523."

The Method Adopted By the Louisiana Tax Commission Violates "Due Process of Law."

Union Tank Line Company v. Wright, Comptroller General of Georgia, 249 U. S. 275, presents a classical likeness to the issue here. Georgia made an assessment of the Union Tank Line Company property based upon the total mileage its cars were assumed to have traversed while being operated by leasing railroads, and, adopting a percentage based upon an assumed mileage traversed by the cars in the State of Georgia, made an assessment of \$291,195.84.

It was stipulated that the assessment against the plaintiff:

"covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the State of Georgia for the time said tax was assessed.

"That defendant in entering said assessment never undertook to ascertain the actual property of plain-

tiff's located in the State of Georgia during the said years or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere as shown by its said return filed on March 16, 1914". (279)

In that case, the taxing authority of Georgia at least ascertained the total mileage and the mileage in Georgia. In this case, these facts were wholly lacking and the assessment rested upon mere guess. The evidence shows that the taxing authorities, did not ascertain the mileage in Louisiana and the mileage outside of Louisiana traversed by all the property of appellees.

The court in the cited case held that the method of assessment violated the "due process of law" clause. The court said that it had recognized the unit rule in the valuation of rolling stock and had approved it as a practical method of tax exacting, which violated no concept of a needed fair contribution to the support of government. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co. v. Ohio*, 165 U. S. 194. However, in that case that method did not result in the taxation of property subject to taxation, but taxed property not subject to the tax. The same result has been achieved in these cases. The adoption of the unit rule is based upon

the fact that the property assessed is a part of a system. The system as a whole is valued and a part allocated to the state in which the tax is sought to be collected. That, however, is wholly different from valuing as a whole tank cars which are no part of the system. The value of the one is not increased by the value of the other, as they are separate entities, susceptible of individual valuation.

The court then said, after it discussed the unit rule, the following: (282)

"But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both".

The court further said: (283)

"In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all States. Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of \$830. Thus the total there, subject to taxation amounted to

\$47,310—the challenged assessment specified \$291,196.

“We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.”

Towboats and barges like tank cars are not elements of a system, but individual entities having an absolute and not a related value. Each towboat and each barge has a value susceptible of measurement without relation to anything else. The application of the principle governing tank cars to this case immediately suggests *itself*.

The Louisiana Tax Commission valued all of the property of each appellee and based its assessment on the entire property of each appellee. It did not value and assess the property in Louisiana. This case is unlike the *Pullman Company* case, where the State valued only the property situated in Pennsylvania and arrived at the amount of the taxes by a method of apportionment. This Court did not uphold any valuation of the entire property of the Pullman Company and allocate a percentage to Pennsylvania for assessment purposes. Here the assessment included the value of property not located in Louisiana, and when a total valuation was reached, a percentage of the total value was allocated to Louisiana, so that into the assessment went the value of property situated in various states as well as property situated in Louisiana. It is easily conceivable that the property out of the State might

have had a different value from the property within the State, so that the total value did not necessarily represent a proportionate value in Louisiana.

J. H. Cain, the Chairman of the Louisiana Tax Commission, who actually made the valuation, when asked if he knew what property was in Louisiana and what property was out of Louisiana, upon which he based his assessment, said:

"I could not tell you hardly; except to say it's an arbitrary value after trying to get the facts from the taxpayer". (R. 79).

He said that he did not know the proportionate mileage in Louisiana as compared to the entire mileage, but took the valuation of the entire towboats and barges of the appellees and allocated a percentage to Louisiana. He did not know how he arrived at the percentage and when asked why he adopted the percentage given to the property of the appellees said:

"Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana". (R. 81).

When asked how he arrived at his figures, he said:

"Well I don't know that I could hardly answer that question, except trying to be fair". (R. 77).

The basis of his assessment is that he was trying to be fair to the other states by adopting a percentage of

value, and leaving to other states the adoption of other percentages. The other members of the Tax Commission testified substantially the same that they did not know the value of the property, nor the percentage of travel in Louisiana. In the choice of a percentage of the total value allocated to Louisiana, Mr. Cain did not know upon what it was based,

"There is nothing indicating it might have been one-half instead of one-third. Or might have been three-fourths in the absence of any real basis for making the assessment". (R. 91).

He further said:

"in the absence of the information having been furnished. I would say that would be arbitrary". (R. 91).

There can be no doubt that in taking the entire property of each of these appellees, whether situated within or without Louisiana, as the basis of the assessment, and exacting taxes on such assessment, these taxes were taken without due process of law. The fact that only a percentage of the entire value was taken, makes it no less a taking in violation of the Constitution. If Louisiana could take any percentage of the entire value of the property of the appellees, regardless of locus, it could take 100%, because there is no limitation upon its plenary power of taxation when the property taxed is subject to its dominion.

If it can tax the entire property on a percentage of 25%, every other state through which the property operates can select its own percentage, so that the entire property of the appellees could be taken by taxation and be-

cause of the possibility of so doing, the states would have the power, not only of impeding the free flow of commerce, but of actually destroying it.

We respectfully submit that the appeal does not lie, because the Court of Appeal did not hold unconstitutional the statute of Louisiana, and for the further fact that even if it had held the statute invalid as applied, its action would have been correct, because as applied to the property of the appellees, it amounted to the taking of property without due process and to the imposition of taxes upon instrumentalities of interstate commerce, with the probable result of not only impeding, but of destroying, that commerce.

○ Respectfully submitted,

ARTHUR A. MORENO,
Attorney for Appellees.

SELIM B. LEMLE,
LOUIS G. LEMLE,
(Of Counsel).

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SUPREME COURT OF THE UNITED STATES

— OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FI-
NANCE AND EX-OFFICIO CITY TREASURER OF
THE CITY OF NEW ORLEANS

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY and
UNION BARGE LINE CORPORATION

Petition For Rehearing

ARTHUR A. MORENO,
Attorney for Petitioners.

SELIM B. LEMLE,
LOUIS G. LEMLE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 244

LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER OF THE CITY OF NEW ORLEANS

versus

MISSISSIPPI VALLEY BARGE LINE COMPANY,
AMERICAN BARGE LINE COMPANY and
UNION BARGE LINE CORPORATION

Petition For Rehearing

The petition for rehearing of the Mississippi Valley Barge Line Company, the American Barge Line Company and the Union Barge Line Corporation with respect represents:

(1) That on the 7th day of February, 1949, this Honorable Court decided the above matter and reversed the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

(2) That it was strongly urged upon the Court the fact that the United States Circuit Court of Appeals, from which the appeal was taken, did not hold the statute unconstitutional, but, on the contrary, held it constitutional and applied it to the case of the DeBardeleben Coal Corporation in the same opinion, which upheld the contention of your petitioners herein.

(3) That the question presented is jurisdictional and fundamental; that notwithstanding it is jurisdictional and should have been considered at the threshold of the case, that, nevertheless, that question was not passed upon nor decided, but the Court proceeded to consider the case and decided it on other grounds.

(4) That the record does not show that there was an average number of towboats and barges of petitioners in the State of Louisiana during the years in which the assessments were made; that the record discloses clearly that there was not an average number of towboats and barges of petitioners in Louisiana within the taxable years, but, notwithstanding that fact, the court decided the case on a fact not shown by the record, but disputed by the record.

(5) That the administrative procedure provided by the State of Louisiana is for the correction of assessments made under proper authority, but, that in this case, the Louisiana Tax Commission did not have authority to make the assessments on the percentage basis, and, therefore, the assessments were not legally made, but unconstitutionally enforced by the collection of the taxes.

(6) That your petitioners do not claim immunity from taxation because of being engaged in interstate commerce, but contend that the assessments included property which had never been in the State of Louisiana and that taxes were collected on assessments which included towboats and barges belonging to petitioners which had never come into the State of Louisiana.

(7) That the taxes were based on assessments which included all of the property of petitioners, regardless of whether or not it had come into Louisiana, so that the decision is in conflict with the decisions in *Union Tank Line Company v. Wright*, 249 U. S. 275 and *Johnson Oil Company of Oklahoma*, 290 U. S. 158, both cited in the brief of petitioners.

WHEREFORE, petitioners respectfully contend that they are entitled to a rehearing, and more particularly, on the jurisdictional question which was presented and not considered, and so pray for such rehearing, even if limited to the jurisdictional question.

Respectfully submitted,

ARTHUR A. MORENO,
Attorney for Petitioners.

SELIM B. LEMLE,
LOUIS G. LEMLE,
Of Counsel.